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Figueroa *v.* Canada (Attorney General), [2003] 1 S.C.R. 912, 2003 SCC 37

Miguel Figueroa *Appellant*

v.

Attorney General of Canada *Respondent*

and

Attorney General of Quebec *Intervener*

Indexed as: Figueroa *v.* Canada (Attorney General)

Neutral citation: 2003 SCC 37.

File No.: 28194.

2002: November 5; 2003: June 27.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

on appeal from the court of appeal for ontario

Constitutional law – Charter of Rights – Democratic rights of citizens – Right to vote – Right to be qualified for membership in House of Commons or provincial legislative assembly – Right to meaningful participation in electoral process – Canada Elections Act providing that political parties must nominate candidates in at least 50 electoral districts to qualify for certain benefits – Whether provisions infringe right to vote or to run for office – If so, whether infringement justifiable – Canadian Charter of Rights and Freedoms, ss. 1, 3 – Canada Elections Act, R.S.C. 1985, c. E-2, ss. 24(2), 24(3), 28(2).

Under the *Canada Elections Act*, a political party must nominate candidates in at least 50 electoral districts in order to obtain, and then to retain, registered party status. Registered parties qualify for several benefits including the right of candidates to issue tax receipts for donations made outside the election period, to transfer unspent election funds to the party and to list their party affiliation on the ballot papers. The appellant challenged the constitutionality of the 50-candidate threshold. The trial judge held that the threshold was inconsistent with s. 3 of the *Canadian Charter of Rights and Freedoms* and that this infringement could not be justified under s. 1 of the *Charter*. The Court of Appeal held that the 50-candidate threshold was not inconsistent with s. 3 of the *Charter*, except to the extent that it denied candidates of non-registered parties the right to identify their party affiliation on the election ballot.

Held: The appeal should be allowed. Sections 24(2), 24(3) and 28(2) of the *Canada Elections Act* are declared unconstitutional. The declaration of unconstitutionality is suspended for 12 months.

Per McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie and Arbour JJ.: While on its face, s. 3 grants only a right to vote and to run for office in elections, *Charter* analysis requires looking beyond the words of the section and adopting a broad and purposive approach. The purpose of s. 3 is effective representation. Section 3 should be understood with reference to the right of each citizen to play a meaningful role in the electoral process, rather than the election of a particular form of government. This right is participatory and adverts only to a right to participate in the electoral process. This definition ensures that s. 3 is not construed too narrowly and emphasizes the reasons why individual participation is important, including respect for diverse opinions and the capacity of individuals to enhance democracy. Full political debate ensures an open society benefiting from diverse opinions and a social policy sensitive to the needs and interests of a broad range of citizens. Participation in the electoral process has an intrinsic value independent of the outcome of elections. The right to run for office provides an opportunity to present ideas and opinions to the electorate and the right to vote provides an opportunity for citizens to express support for ideas and opinions. In a democracy, sovereign power resides in the people as a whole and each citizen must have a genuine opportunity to take part in the governance of the country through participation in the selection of elected representatives.

The right to play a meaningful role in the electoral process is not subject to countervailing collective interests. A proportionality analysis considering benefits related to other democratic values should occur under s. 1, where limitations on the right are to be justified. This analytical approach does not vary with the nature of the alleged breach nor is s. 3 qualified in the same sense as ss. 7 and 8 of the *Charter*. The fact that we identify its implicit content with qualified phrases such as a voter's right to be reasonably informed or a candidate's right to have a reasonable opportunity to present a position reflects only that s. 3 does not protect the right of each citizen to play an unlimited role in the electoral process. The aggregation of political preferences is not to be elevated to constitutional status nor does s. 3 protect values or objectives embedded in our current electoral system.

Members and supporters of political parties that nominate fewer than 50 candidates meaningfully participate in the electoral process. The ability of a party to make a valuable contribution is not dependent upon its capacity to offer the electorate a genuine "government option". Political parties have a much greater capacity than any one citizen to participate in debate and they act as a vehicle for the participation of individual citizens in the political life of the country. All political parties are capable of introducing unique interests and concerns into the political discourse and marginal or regional parties tend to raise issues not adopted by national parties. Political parties provide individual citizens with an opportunity to express an opinion on the policy and functioning of government. Each vote in support of a party increases the likelihood that its platform will be taken into account by those who implement policy and votes for parties with fewer than 50 candidates are an integral component of a vital and dynamic democracy.

Withholding the right to issue tax receipts and to retain unspent election funds from candidates of parties that have not met the 50-candidate threshold undermines the right of each citizen to meaningful participation in the electoral process. Section 3 imposes on Parliament an obligation not to enhance the capacity of one citizen to participate in the electoral process in a manner that compromises another citizen's parallel right to meaningful participation. Political parties that have satisfied the threshold requirement have more resources for communication than those that have not. The 50-candidate threshold thus infringes s. 3 of the *Charter* by decreasing the capacity of the members and supporters of the disadvantaged parties to introduce ideas and opinions into the open dialogue and debate that the electoral process engenders. Moreover, the right to vote in accordance with preferences requires each citizen to have information to assess party platforms and the legislation undermines the right to information protected by s. 3.

Withholding the right to list party affiliations on ballots from parties that have not satisfied the 50-candidate threshold also infringes s. 3 of the *Charter*. First, withholding this benefit diminishes the capacity of individual citizens to participate in the public discourse since there is a close connection between the support a party receives in an election and its capacity to influence policy. Second, it undermines the right of each citizen to make an informed choice and to vote according to preference. Affiliation has a significant informational component and some voters may be unable to vote for a preferred candidate if the party affiliation is not listed on the ballot paper.

The infringement is not saved by s. 1 of the *Charter*. While the objective of ensuring the cost-efficiency of the tax credit scheme is pressing and substantial, the 50-candidate threshold does not meet the proportionality branch of the *Oakes* test. There is no connection whatsoever between the objective and the threshold requirement with respect to transfers of unspent election funds or listing party affiliations on ballot papers. Nor is the restriction on the right of political parties to issue tax receipts for donations received outside the election period rationally connected to the objective. The connection between legislation that has no impact upon either the number of citizens allowed to claim the tax credit or the size of the credit and the objective is tenuous at best. Moreover, the government has provided no evidence that the threshold actually improves the cost-efficiency of the tax credit scheme. The legislation also fails the minimal impairment test because cost savings can be achieved without violating s. 3. Further, any benefits associated with the reduced costs of the tax credit scheme do not outweigh the deleterious effects of this legislation.

While preserving the integrity of the electoral process is a pressing and substantial concern in a free and democratic state, this objective provides no justification for the restriction on the right of candidates to list their party affiliation on the ballot papers. The same is true of the restriction on the right to issue tax credits and the right to transfer unspent election funds to the party. Furthermore, even if the restrictions on the right to issue the tax credit and the right to retain unspent election funds prevent the misuse of the electoral financing regime, the legislation fails the minimal impairment test. In each instance, the government has failed to demonstrate that it could not achieve the same results without violating s. 3 of the *Charter*.

Lastly, articulating the objective as ensuring a viable outcome for responsible government in the form of majority governments is problematic. In any event, the 50-candidate threshold fails the rational connection test and its salutary benefits have not been shown to outweigh its deleterious effects.

Per Gonthier, LeBel and Deschamps JJ.: While capacity to play a meaningful role in the electoral process is a core value of s. 3, stating the sole question at the infringement stage of the analysis as whether the legislation interferes with that capacity understates the complexity of effective representation and meaningful participation. These concepts comprise intertwined and opposed principles. The proper approach is to define the right through a contextual and historical analysis. The impugned legislation furthers significant democratic values by forming part of a scheme that recognizes and regulates political parties. The 50-candidate threshold benefits parties with broad appeal and encourages the aggregation of political will. These are important values, as evidenced by their place in our history and institutions, that in principle could be furthered at the price of compromising individual participation to a certain extent. In this case, however, the legislation goes too far and conflicts with s. 3.

Individual participation is of central importance, but s. 3 is also concerned with the representation of communities. Meaningful participation involves political groups and alliances between groups representing communities. Section 3 must also be interpreted in harmony with our political traditions and a purely individualistic approach is difficult to reconcile with Canadian political values. Not every government measure with an adverse impact on participation renders it meaningless and legislation to further other democratic values may compromise individual participation without necessarily depriving citizens of meaningful representation.

Diminution of one aspect of effective representation can ultimately result in more effective representation, suggesting that effective representation consists of many different components. Meaningful participation similarly comprises different aspects. It can be just as meaningful to participate as a member of a group as it is to participate as an individual. Enhancing group participation almost inevitably entails some cost to individual participation. The question is whether there is undue dilution of the individual citizen's capacity to participate, in other words, whether the opportunity to make free choices or to compete fairly in the political process is so constricted that there is no genuine opportunity to participate.

The infringement analysis should not stop with a finding of interference with meaningful participation. It should examine the severity of the interference and the reason for it, considering all relevant contextual factors. Some balancing of competing values is appropriate when defining protected rights and values and a full proportionality analysis should consider the competing values in s. 3. Ascertaining whether s. 3 has been infringed requires acknowledging the need for an appropriate compromise between the competing forces that together define meaningful participation. The content and scope of every *Charter* right is determined with reference to its purpose, which may be connected to both individual and group concerns. Section 3 is not a qualified right but its implicit content is identified with qualified phrases. Section 3 ensures that voters are reasonably informed and that parties and candidates have a reasonable opportunity to present their positions. These implicit protections are to be included if s. 3 is to be given full effect. Section 3 cannot be understood without reference to its social and systemic context. Its exercise requires state involvement. It obliges the government to set up an electoral system providing for democratic government in accordance with voters' choices. Measuring the system requires assessing how well it represents both Canadian society as a whole and the groups that make up our social fabric. The analysis should consider whether it provides effective representation and meaningful participation, bearing in mind countervailing values including social and collective values. This is not equated with a s. 1 analysis but does depend on whether there are corresponding benefits related to other democratic values and whether the end result is a deprivation of meaningful participation.

The 50-candidate threshold furthers an aspect of effective representation that can validly be weighed against the value of individual participation. It enhances the aggregation of political preferences and promotes cohesion, values closely connected to the role of political parties in the Canadian electoral system. The threshold is part of a scheme furthering the important democratic values of accountability, political communication, and grassroots participation and cannot be divorced from its context for the purposes of constitutional scrutiny.

Legal recognition of parties necessitates a definition of a party. Parties develop policy and compete in elections. The registration system relates to their competitive role and making the benefits of registration available to groups that do not seriously compete in elections could undermine the scheme. The 50-candidate rule shuts out genuine competitors, however, and limits opportunities to support small parties. It would be possible to enhance democratic values without so large a threshold.

Inequities in the electoral system are not acceptable merely because they have historical precedent and institutions are not constitutional merely because they already exist. Our electoral infrastructure is deliberately designed to confer advantages on mainstream political movements. Our system of voting tends to produce majority governments and reflects a preference for broadly supported parties. The government has latitude in how to design the electoral system and the prerogative to choose to enhance aggregation of political will and cohesiveness. These values should be taken into account and our history and existing institutions identify a philosophy that recognizes values other than individual participation. Within the limits of what is permissible set by the right to meaningful participation, the legislative choice of a version of democratic representation is a matter in which this Court should not intervene. Regional representation, a third aspect and a component of effective representation and meaningful participation, is also implicated. Regional representation can conflict with the value of individual participation on an equal footing. Regional representation, although not to be overstated, is one of the values to be taken into account in defining meaningful representation and determining whether government action offends s. 3.

The 50-candidate threshold infringes s. 3 by denying some candidates and their supporters the opportunity for meaningful participation. It is a burden for parties committed to running serious campaigns in a few ridings and it is not a perfect tool for aggregating political preferences or identifying parties with a commitment to electoral competition and a substantial political agenda. Nominating a candidate does not necessarily indicate support in a constituency. The rule can be over- or underinclusive and is potentially subject to manipulation. It permits registrations of parties viewed as far removed from mainstream politics or as single-issue movements. It can shut out parties with fully developed platforms and a genuine interest in electoral competition. Finally, it conflicts with regional representation and has a disparate impact in that registration of a single-province party can occur only in Ontario and Quebec.

The justifications advanced by the government have been considered in the infringement stage of this analysis and the finding that the threshold infringes s. 3 essentially amounts to a conclusion that it is inconsistent with the values of Canadian democracy. There would be no reason in a full s. 1 analysis to doubt that the legislative objectives are pressing and substantial. The values furthered are consistent with some of the fundamental principles of a free and democratic society and favouring large parties may not be discordant with those principles. The Crown should not be required to demonstrate that the electoral system adopted by Parliament results in substantially better governance than an alternative system because it is hard to imagine how it would prove that proposition and the definition of

good or better government should not be fixed as a legal standard. The Court risks unduly expanding the scope of judicial review of the design of the electoral system by suggesting that the motive behind the legislation may itself be illegitimate. Whatever system is adopted must respect the right of each individual to meaningful participation but that right should not be defined too inflexibly.

Cases Cited

By Iacobucci J.

Explained: *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158; **referred to:** *R. v. Oakes*, [1986] 1 S.C.R. 103; *Dixon v. British Columbia (Attorney General)*, [1989] 4 W.W.R. 393; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Haig v. Canada*, [1993] 2 S.C.R. 995; *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519, 2002 SCC 68; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *Switzman v. Elbling*, [1957] S.C.R. 285; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2; *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569; *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *M. v. H.*, [1999] 2 S.C.R. 3; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *Schachter v. Canada*, [1992] 2 S.C.R. 679; *Egan v. Canada*, [1995] 2 S.C.R. 513; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3.

By LeBel J.

Distinguished: *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519, 2002 SCC 68; *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876; **referred to:** *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158; *Canadian Disability Rights Council v. Canada*, [1988] 3 F.C. 622; *Muldoon v. Canada*, [1988] 3 F.C. 628; *Re Hoogbruin and Attorney-General of British Columbia* (1985), 24 D.L.R. (4th) 718; *Dixon v. British Columbia (Attorney General)*, [1989] 4 W.W.R. 393; *MacKinnon v. Prince Edward Island* (1993), 104 Nfld. & P.E.I.R. 232; *Reference re Electoral Boundaries Commission Act (Alberta)* (1991), 83 Alta. L.R. (2d) 210; *Reference re Electoral Divisions Statutes Amendment Act, 1993 (Alberta)* (1994), 24 Alta. L.R. (3d) 1; *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Mills*, [1999] 3 S.C.R. 668; *R. v. Advance Cutting & Coring Ltd.*, [2001] 3 S.C.R. 209, 2001 SCC 70; *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211; *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569; *Haig v. Canada*, [1993] 2 S.C.R. 995; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

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Canada Elections Act, S.C. 2000, c. 9, ss. 370(1), 385.

Canadian Charter of Rights and Freedoms, ss. 1, 2(*d*), 3, 7, 8, 15(1).

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APPEAL from a judgment of the Ontario Court of Appeal (2000), 50 O.R. (3d) 161, 189 D.L.R. (4th) 577, 137 O.A.C. 252, [2000] O.J. No. 3007 (QL), varying a judgment of the Ontario Court (General Division) (1999), 43 O.R. (3d) 728, 170 D.L.R. (4th) 647, 61 C.R.R. (2d) 91, [1999] O.J. No. 689 (QL). Appeal allowed.

Peter Rosenthal and *Kikelola Roach*, for the appellant.

Roslyn J. Levine, Q.C., *Gail Sinclair* and *Peter Hajecek*, for the respondent.

Dominique A. Jobin and *Sébastien Arès*, for the intervener.

The judgment of McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie and Arbour JJ. was delivered by

IACOBUCCI J. —

I. Introduction

1 This appeal raises fundamental questions in respect of the democratic process in our country. More specifically, this appeal focusses on the purpose and meaning to be given to s. 3 of the *Canadian Charter of Rights and Freedoms*, which confers on each citizen the right to vote in the election of members of the House of Commons and the provincial legislative assemblies and to be qualified for membership therein. The issue is whether federal legislation that restricts access to certain benefits to political parties that have nominated candidates in at least 50 electoral districts violates s. 3. I conclude that it does and would therefore allow the appeal.

II. Legislative Background

2 Under the *Canada Elections Act*, R.S.C. 1985, c. E-2 (the "*Elections Act*"), political parties seeking registered party status must comply with a number of requirements. A political party seeking registered party status must have at least 100 members and must appoint a leader, a chief agent and an auditor. These requirements are not at issue in this appeal.

3 At issue in this appeal is the requirement that a political party must nominate candidates in at least 50 electoral districts in order to obtain, and then to retain, registered party status:

> **24.** . . .
>
> (2) On receipt of an application for registration of a political party pursuant to subsection (1), the Chief Electoral Officer shall examine the application and determine whether the party can be registered under this section and
>
> (*a*) where he determines that, on the nomination by the party of fifty candidates in accordance with paragraph 3(*a*) or (*b*), whichever is applicable, the party could be

registered, so inform the leader of the party; or

(*b*) in any other case, inform the leader of the party that the party cannot be registered.

(3) Where the leader of a political party has been informed by the Chief Electoral Officer pursuant to paragraph 2(*a*) that, on the nomination of fifty candidates in accordance with paragraph (*a*) or (*b*), whichever is applicable, the party could be registered, the party shall be registered

(*a*) if the application for registration is filed within the period commencing with the day following polling day at one general election and terminating on the sixtieth day before the issue of writs for the next general election, on the day after the party had officially nominated candidates in fifty electoral districts at the next general election, or

(*b*) if the application for registration is filed within the period commencing with the fifty-ninth day before the issue of writs for a general election and terminating on polling day at that election, on the day after the party has officially nominated candidates in fifty electoral districts at the general election next following the general election falling within that period,

and if the political party fails to nominate fifty candidates in accordance with paragraph (*a*) or (*b*), whichever is applicable, the Chief Electoral Officer shall inform the leader of the party that the party cannot be registered.

28. . . .

(2) The Chief Electoral Officer shall, on the close of nominations at a general election, delete from the registry referred to in subsection 24(1), any registered party that did not at the close of nominations on that day have candidates in at least fifty of the electoral districts.

4 Upon obtaining registered party status, a political party is qualified for a number of benefits. Among these benefits is the right to free broadcast time, the right to purchase reserved broadcast time, and the right to partial reimbursement of election expenses upon receiving a certain

percentage of the vote. The constitutionality of withholding these benefits from political parties that have not satisfied the 50-candidate threshold is not at issue in this appeal. The only benefits that will be considered in this appeal are the right of a political party to issue tax receipts for donations received outside the election period, the right of a candidate to transfer unspent election funds to the party (rather than remitting them to the government), and the right of a party's candidates to list their party affiliation on the ballot papers.

5 The right of the party to issue tax receipts for donations received outside the election period is provided for by s. 127(3) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.):

> **127.** . . .
>
> (3) There may be deducted from the tax otherwise payable by a taxpayer under this Part for a taxation year in respect of the total of all amounts each of which is a monetary contribution made by the taxpayer in the year to a registered party or to a candidate whose nomination has been confirmed in an election of a member or members to serve in the House of Commons of Canada (in this section referred to as "the total"),
>
> (*a*) 75% of the total, if the total does not exceed $200,
>
> (*b*) $150 plus 50% of the amount by which the total exceeds $200, if the total exceeds $200 and does not exceed $550, or
>
> (*c*) the lesser of
>
> (i) $325 plus 33 1/3% of the amount by which the total exceeds $550, and
>
> (ii) $500,
>
> if payment of each monetary contribution that is included in the total is proven by filing a receipt with the Minister, signed by a registered agent of the registered party or by the official agent of the candidate whose nomination has been confirmed, as the case may be, that contains prescribed information.

6 The right of a candidate to transfer unspent election funds to the party rather than the Receiver General is provided for by s. 232 of the *Elections Act*:

> **232.** Where the aggregate of all money received by
>
> (*a*) an official agent of a candidate pursuant to paragraph 217(1)(*b*),
>
> (*b*) the official agent pursuant to sections 241 to 247, and
>
> (*c*) the candidate as a refund under this Act of the deposit made by him pursuant to paragraph 81(1)(*j*),
>
> is in excess of the amount required by the candidate to pay the aggregate of the deposit referred to in paragraph 81(1)(*j*) and
>
> (*d*) election expenses and all other reasonable expenses incidental to the election,
>
> (*e*) personal expenses,
>
> (*f*) auditor's fees in excess of the amount paid under paragraph 243(4)(*b*) or subsection 244(2), and
>
> (*g*) costs with respect to a recount pursuant to subsection 171(1) or sections 176 to 184 of the votes cast in his electoral district, to the extent that the costs exceed any amount paid to the candidate by the Receiver General pursuant to subsection 171(5),

incurred by him in relation to the election, the amount of the excess shall be paid by the official agent,

(*h*) where the political affiliation of the candidate was shown on the ballot paper as a registered party, to any local organization or association of members of the party in the electoral district of the candidate or to the registered agent of the party, or

(*i*) in any other case, to the Receiver General,

within one month after the official agent of the candidate receives reimbursement pursuant to subsection 243(4) in respect of the candidate's election expenses or two months after the filing by the official agent of the return respecting election expenses in respect of the candidate, whichever is the later.

7 Finally, the right of the party's candidates to list their party affiliation on the ballot papers is provided for by s. 100 of the *Elections Act*:

100. (1) All ballot papers shall be of the same description and as nearly alike as possible and each ballot paper shall be a printed paper on which

(*a*) the names of the candidates, alphabetically arranged in the order of their surnames, shall be set out as those names appear in their nomination papers;

(*b*) the political affiliation of each candidate, if any, as indicated under section 81 at the time of nomination of the candidate, shall be set out, after or under the name of the candidate;

. . .

> (2) Notwithstanding subsection (1), where a candidate at an election has filed an instrument in writing pursuant to paragraph 81(1)(*h*) stating that the political affiliation of the candidate is a registered party named in the instrument and the registered party is deleted from the registry by the Chief Electoral Officer, either before or after nomination of the candidate, neither the word "independent" nor any other political affiliation shall be set out after or under the name of the candidate on the ballot paper for the electoral district for which the candidate has been nominated.

8 The effect of these provisions is that candidates nominated by political parties that have not satisfied the 50-candidate threshold are not entitled to issue tax receipts for donations received outside the election period, to transfer unspent election funds to the party or to list their party affiliation on the ballot papers.

III. Judicial History

A. *Ontario Court (General Division)* (1999), 43 O.R. (3d) 728

9 Molloy J. held that implicit in the right to vote is the right to vote in a fair and democratic election in which all participants are treated as equals. She was of the view that the values underlying the *Charter* demand that democratic rights be available to all citizens on an equal basis. As a consequence, if the government decides to extend a benefit to one political party, that benefit must be equally available to all political parties. Because the effect of the 50-candidate threshold is that only certain political parties are entitled to the benefits in question, Molloy J. found that the threshold is inconsistent with the right of each citizen to run for office. It also is inconsistent with s. 3 of the *Charter* because it deprives voters of the information necessary to make an informed decision. It was her conclusion that the right to vote includes the right to be fully informed as to the party affiliation of each candidate.

10 Molloy J. then held that this infringement of s. 3 could not be justified under s. 1 of the *Charter* because the stated objective of distinguishing between parties with different levels of support was not pressing and substantial. She held that providing benefits only to those political parties with a broad base of support is the very antithesis of a true democracy. Moreover, even if that objective could be characterized as pressing and substantial, the legislation would fail the *Oakes* test because the 50-candidate threshold is not rationally connected to that objective since the 50-candidate threshold does not accurately measure public support.

11 Molloy J. thus ordered that the 50-candidate threshold for registered party status be read down to a 2-candidate threshold. The Attorney General appealed to the Court of Appeal for Ontario.

B. *Ontario Court of Appeal* (2000), 50 O.R. (3d) 161

12 Doherty J.A. held that Molloy J. was incorrect to conclude that s. 3 includes a general fairness requirement that requires that benefits provided to some political parties must be provided to all political parties. In his view, the question of whether the 50-candidate threshold violates s. 3 of the *Charter* must be determined with reference to the purpose of s. 3, which is the protection of the right to "effective representation" (para. 69). The issue to be determined, then, is whether the favoured treatment of political parties that nominate candidates in 50 or more electoral districts is inconsistent with the right to effective representation.

13 According to Doherty J.A., effective representation is the desired end product of the electoral process. On this view, the capacity of a political party to enhance effective representation becomes operative only where the party structures voter choice at the national level and offers the electorate an opportunity to become involved in the choosing of a government. As a consequence, statutory provisions that bestow benefits on political parties as a means of enhancing effective representation properly distinguish between (i) parties whose commitment to the process is sufficient to serve that goal and (ii) parties whose commitment is so minimal as to be incapable of serving that goal. Doherty J.A. found that the 50-candidate threshold is an acceptable means of gauging that level of commitment.

14 With respect to the right of candidates to identify their party affiliation on election ballots, Doherty J.A. held that the right to effective representation includes the right to make an informed, rational choice. Because the identification of party affiliation is an essential aspect of this right, extending this benefit only to registered parties constitutes a violation of s. 3 of the *Charter*. Doherty J.A. held that this violation could not be saved under s. 1. Although the objective of ensuring that voters are not confused or misled by information on election ballots is pressing and substantial, the 50-candidate threshold fails the minimal impairment test, owing to the fact that it extends the prohibition to instances in which there is no danger that the identification of a candidate's party affiliation would confuse or mislead voters.

15 Doherty J.A. thereby determined that the requirement that a political party must nominate at least 50 candidates to attain registered party status is not inconsistent with s. 3 of the *Charter*, except to the extent that it denies candidates of non-registered parties the right to identify their party affiliation on the election ballot.

IV. Issues

16 The question to be determined in this appeal is whether ss. 24(2), 24(3) and 28(2) of the *Elections Act* infringe s. 3 of the *Charter* by withholding from candidates nominated by political parties that have failed to satisfy the 50-candidate threshold the right to issue tax receipts for donations received outside the election period, the right to transfer unspent election funds to the party, and the right to list their party affiliation on the ballot papers — and, if so, whether that infringement is reasonable and demonstrably justified under s. 1 of the *Charter*.

17 The appellant also submits that ss. 24(2), 24(3) and 28(2) of the *Elections Act* infringe ss. 2 (*d*) and 15(1) of the *Charter*, and that those infringements cannot be justified under s. 1. Having determined that this matter can be disposed of solely with reference to s. 3 of the *Charter*, I do not address either of those submissions. I also note that this appeal centres on participation in the electoral process that precedes the Parliamentary process. Hence, the manner in which Parliament determines which political parties have official status in the House of Commons is not at issue in this appeal.

V. Analysis

A. *Does the 50-Candidate Threshold Violate Section 3 of the Charter?*

18 The first question to be determined in this appeal is whether the restriction on the right of candidates to issue tax receipts for donations received outside the election period, to transfer unspent election funds to the party, and to list their party affiliation on the ballot papers infringes s. 3 of the *Charter*. This requires the Court to perform two tasks. The first is to define the purpose of s. 3 of the *Charter*. The second is to evaluate the 50-candidate threshold in light of that definition in order to determine whether it violates s. 3 of the *Charter*.

(1) Section 3 of the *Charter*

19 Under s. 3 of the *Charter*, "[e]very citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein". On its face, the scope of s. 3 is relatively narrow: it grants to each citizen no more than the bare right to vote and to run for office in the election of representatives of the federal and provincial legislative assemblies. But *Charter* analysis requires courts to look beyond the words of the section. In

the words of McLachlin C.J.B.C.S.C. (as she then was), "[m]ore is intended [in the right to vote] than the bare right to place a ballot in a box": *Dixon v. British Columbia (Attorney General)*, [1989] 4 W.W.R. 393, at p. 403.

20 In order to determine the scope of s. 3, the Court must first ascertain its purpose. As Dickson J. (as he then was) wrote in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344, "[t]he interpretation [of a section of the *Charter*] should be . . . a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection". In interpreting the scope of a *Charter* right, courts must adopt a broad and purposive approach that seeks to ensure that duly enacted legislation is in harmony with the purposes of the *Charter*.

21 This Court first considered the purpose of s. 3 in *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158 ("*Saskatchewan Reference*"). In determining that s. 3 does not require absolute equality of voting power, McLachlin J. held that the purpose of s. 3 is "effective representation" (p. 183). This Court has subsequently confirmed, on numerous occasions, that the purpose of s. 3 is effective representation: see *Haig v. Canada*, [1993] 2 S.C.R. 995; *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876; and *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877.

22 The Court of Appeal for Ontario concluded that effective representation is "the desired end product of the electoral process" (para. 80). In particular, it found that effective representation exists where the electoral process results in the formation of a majority government that has structured choice and aggregated preferences at the national level. On this view, the purpose of s. 3 is engaged only by those political parties that possess the capacity to aggregate interests on a national level and participate in the governance of the country subsequent to an election. A party that does not participate in an election with a view to forming a government, or at least of winning a substantial number of seats in Parliament, is not a party that possesses the capacity to advance the objective of effective representation. Thus, it is not improper to withhold benefits from political parties whose level of participation is so minimal as to be incapable of serving that goal.

23 With respect, this is not how I understand McLachlin J.'s statement that the purpose of s. 3 is effective representation. In my view, McLachlin J. was not referring to a collective interest in a desired end product of the electoral process that results in majority government. Rather, my colleague emphasized the right of each citizen to an effective representative in the legislative assembly. She wrote, at p. 183:

> It is my conclusion that the purpose of the right to vote enshrined in s. 3 of the *Charter*

> is not equality of voting power *per se*, but the right to "effective representation". Ours is a representative democracy. Each citizen is entitled to be represented in government. Representation comprehends the idea of having a voice in the deliberations of government as well as the idea of the right to bring one's grievances and concerns to the attention of one's government representative. [First emphasis added; second emphasis in original.]

The issue in that case was not whether the departure from absolute voter parity could be justified by virtue of the benefits that it provided to rural voters, but whether the departure from absolute voter parity was inconsistent with the right of urban voters to an effective representative in the legislative assembly. The Court concluded that the departure from absolute voter parity was consistent with s. 3, not because the departure provided for the more effective representation of rural voters, but, rather, because it did not interfere with the right of urban voters to an effective representative in the legislative assembly.

24 Consequently, I do not agree with LeBel J.'s conclusion, at para. 117 of his reasons, that the *Saskatchewan Reference* established that the diminution of one aspect of effective representation (parity) can ultimately result in the provision of more effective representation. Rather, the *Saskatchewan Reference* established that it is a mistake to conflate the right of each citizen to effective representation with a right to absolute voter parity. As McLachlin J. wrote, at p. 181, "practical considerations such as social and physical geography may impact on the value of the citizen's right to vote" (emphasis added). The *Saskatchewan Reference*, *supra*, instructs us that it may be necessary to consider a broad range of social factors prior to determining that a departure from absolute voter parity does, in fact, interfere with the right of each citizen to effective representation. If the departure from absolute voter parity does not interfere with the right of each citizen to effective representation, it does not infringe s. 3.

25 But the right to effective representation contemplates more than the right to an effective representative in Parliament or a legislative assembly. In *Haig*, *supra*, L'Heureux-Dubé J., for the majority of the Court, summarized McLachlin J.'s discussion of the purpose of s. 3 as follows (at p. 1031):

> Clearly, in a democratic society, the right to vote as expressed in s. 3 must be given a content commensurate with those values embodied in a democratic state. For the majority of the Court, McLachlin J. concluded at p. 183 that it is the Canadian system of effective representation that is at the centre of the guarantee:
>
> > . . . the purpose of the right to vote enshrined in s. 3 of the *Charter* is not equality of voting power *per se*, but the right to "effective representation". Ours is a representative democracy. Each citizen is entitled to be represented in government. Representation comprehends the idea of having a voice in the deliberations of government as well as

> the idea of the right to bring one's grievances and concerns to the attention of one's government representative.
>
> The purpose of s. 3 of the *Charter* is, then, to grant every citizen of this country the right to play a meaningful role in the selection of elected representatives who, in turn, will be responsible for making decisions embodied in legislation for which they will be accountable to their electorate. [First emphasis in original; second emphasis added.]

As this passage indicates, this Court has already determined that the purpose of s. 3 includes not only the right of each citizen to have and to vote for an elected representative in Parliament or a legislative assembly, but also to the right of each citizen to play a meaningful role in the electoral process. This, in my view, is a more complete statement of the purpose of s. 3 of the *Charter*.

26 Support for the proposition that s. 3 should be understood with reference to the right of each citizen to play a meaningful role in the electoral process, rather than the election of a particular form of government, is found in the fact that the rights of s. 3 are participatory in nature. Section 3 does not advert to the composition of Parliament subsequent to an election, but only to the right of each citizen to a certain level of participation in the electoral process. On its very face, then, the central focus of s. 3 is the right of each citizen to participate in the electoral process. This signifies that the right of each citizen to participate in the political life of the country is one that is of fundamental importance in a free and democratic society and suggests that s. 3 should be interpreted in a manner that ensures that this right of participation embraces a content commensurate with the importance of individual participation in the selection of elected representatives in a free and democratic state. Defining the purpose of s. 3 with reference to the right of each citizen to play a meaningful role in the electoral process, rather than the composition of Parliament subsequent to an election, better ensures that the right of participation that s. 3 explicitly protects is not construed too narrowly.

27 An understanding of s. 3 that emphasizes the right of each citizen to play a meaningful role in the electoral process also is sensitive to the full range of reasons that individual participation in the electoral process is of such importance in a free and democratic society. As Dickson C.J. wrote in *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 136:

> The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.

In this passage, Dickson C.J. was addressing s. 1. Yet since reference to "a free and democratic society" is essential to an enriched understanding of s. 3, this passage indicates that the best interpretation of s. 3 is one that advances the values and principles that embody a free and democratic state, including respect for a diversity of beliefs and opinions. Defining the purpose of s. 3 with reference to the right of each citizen to meaningful participation in the electoral process, best reflects the capacity of individual participation in the electoral process to enhance the quality of democracy in this country.

28 As this Court frequently has acknowledged, the free flow of diverse opinions and ideas is of fundamental importance in a free and democratic society. In *R. v. Keegstra*, [1990] 3 S.C.R. 697, at pp. 763-64, Dickson C.J. described the connection between the free flow of diverse opinions and ideas and the values essential to a free and democratic society in the following terms:

> The connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(*b*) guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy. Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons. Such open participation must involve to a substantial degree the notion that all persons are equally deserving of respect and dignity. The state therefore cannot act to hinder or condemn a political view without to some extent harming the openness of Canadian democracy and its associated tenet of equality for all.

Put simply, full political debate ensures that ours is an open society with the benefit of a broad range of ideas and opinions: see *Switzman v. Elbling*, [1957] S.C.R. 285, at p. 326; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at p. 583; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at p. 1336; and *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 23. This, in turn, ensures not only that policy makers are aware of a broad range of options, but also that the determination of social policy is sensitive to the needs and interests of a broad range of citizens.

29 It thus follows that participation in the electoral process has an intrinsic value independent of its impact upon the actual outcome of elections. To be certain, the electoral process is the means by which elected representatives are selected and governments formed, but it is also the primary means by which the average citizen participates in the open debate that animates the determination of social policy. The right to run for office provides each citizen with the opportunity to present certain ideas and opinions to the electorate as a viable policy option; the right to vote provides each citizen with the opportunity to express support for the ideas and opinions that a particular candidate endorses. In each instance, the democratic rights entrenched in s. 3 ensure that each citizen has an opportunity to express an opinion about the formation of social policy and the functioning of public institutions through participation in the electoral process.

30 In the final analysis, I believe that the Court was correct in *Haig*, *supra*, to define s. 3 with reference to the right of each citizen to play a meaningful role in the electoral process. Democracy, of course, is a form of government in which sovereign power resides in the people as a whole. In our system of democracy, this means that each citizen must have a genuine opportunity to take part in the governance of the country through participation in the selection of elected representatives. The fundamental purpose of s. 3, in my view, is to promote and protect the right of each citizen to play a meaningful role in the political life of the country. Absent such a right, ours would not be a true democracy.

31 For this reason, I cannot agree with LeBel J. that it is proper, at this stage of the analysis, to balance the right of each citizen to play a meaningful role in the electoral process against other democratic values, such as the aggregation of political preferences. Legislation that purports to encourage the aggregation of political preferences might advance certain collective interests, but it does not benefit all citizens, namely, those whose interests are not aggregated by the mainstream political parties. As a result, the proportionality analysis endorsed by LeBel J. clearly admits of the possibility that collective or group interests will be balanced against the right of each citizen to play a meaningful role in the electoral process at the infringement stage of the analysis. If the government is to interfere with the right of each citizen to play a meaningful role in the electoral process in order to advance other values, it must justify that infringement under s. 1.

32 This approach is consistent with the well-established principle that limitations on the individual rights that the *Charter* protects must be justified under s. 1. As this Court repeatedly has affirmed, this is no less true of s. 3 than it is of other sections of the *Charter*: see for example *Harvey*, *supra*, at p. 897, and *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519, 2002 SCC 68, at para. 11, in which McLachlin C.J. wrote that the ambit of s. 3 "should not be limited by countervailing collective concerns". LeBel J. distinguishes this case from *Harvey* and *Sauvé* on the basis that those cases involved a literal prohibition on the right to vote or to run for office, whereas this case involves the conditions under which citizens exercise those rights. In his view, legislation that affects the conditions under which citizens vote or run for an election without directly clashing with its plain language calls for a different kind of analysis, namely, one that involves a balancing of competing values.

33 With respect, I do not agree with LeBel J. that the proper analytical approach varies with the nature of the alleged breach. The only difference, in my view, is one of proof. As discussed throughout, the purpose of s. 3 is to protect the right of each citizen to play a meaningful role in the electoral process. Where the impugned legislation is inconsistent with the express language of s. 3, it is unnecessary to consider the broader social or political context in order to determine whether the legislation interferes with the right of each citizen to play a meaningful role in the electoral process. It is plain and obvious that the legislation has this effect. But where the legislation affects the conditions in which citizens exercise those rights it may not be so obvious whether the legislation has this effect. Consequently, it may be necessary to consider a broad range of factors, such as social or physical

geography, in order to determine whether the legislation infringes the right of each citizen to play a meaningful role in the electoral process. In neither instance, however, is the right of each citizen to play a meaningful role in the electoral process subject to countervailing collective interests. These interests fall to be considered under s. 1.

34 As this suggests, I do not believe that the right to play a meaningful role in the electoral process is a "qualified" right, in the same sense as the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice (s. 7) or the right to be secure against unreasonable search and seizure (s. 8). It should be noted that the language of s. 7 and s. 8 contains balancing language within the provisions themselves. Accordingly, it is not only appropriate but obligatory to recognize this in interpreting their meaning: see for example *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451; and *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, which are referenced by my colleague.

35 According to LeBel J., the fact that we identify the implicit content of s. 3 with reference to qualified phrases such as the right a voter to be "reasonably informed of all the possible choices", or the right of parties and candidates to have "a reasonable opportunity to present their positions" (*Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, at para. 47 (emphasis added)) indicates that the balancing of individual and collective interests that is appropriate in the context of the expressly "qualified" rights also applies under s. 3, except when literal disqualifications are at issue.

36 In my view, the use of such language does not indicate that the right of each citizen to play a meaningful role in the electoral process is to be balanced against countervailing values, such as the collective interest in the aggregation of political preferences. Rather, the use of such phrases reflects that the purpose of s. 3 is not to protect the right of each citizen to play an unlimited role in the electoral process, but to protect the right of each citizen to play a meaningful role in the electoral process; the mere fact that the legislation departs from absolute voter equality or restricts the capacity of a citizen to participate in the electoral process is an insufficient basis on which to conclude that it interferes with the right of each citizen to play a meaningful role in the electoral process. But if the legislation does, in fact, interfere with the capacity of each citizen to play a meaningful role in the electoral process, it is inconsistent with s. 3. Any corresponding benefits related to democratic values other than the right of each citizen to play a meaningful role must be considered under s. 1.

37 Finally, although certain aspects of our current electoral system encourage the aggregation of political preferences, I do not believe that this aspect of the current electoral system is to be elevated to constitutional status. In his reasons, LeBel J. argues that first-past-the-post elections favour mainstream parties that have aggregated political preferences on a national basis. This might, indeed, be true. But the fact that our current electoral system reflects certain political values does not mean that those values are embedded in the *Charter*, or that it is appropriate to balance those values against the right of each citizen to play a meaningful role in the electoral process. After all, the *Charter* is entirely

neutral as to the type of electoral system in which the right to vote or to run for office is to be exercised. This suggests that the purpose of s. 3 is not to protect the values or objectives that might be embedded in our current electoral system, but, rather, to protect the right of each citizen to play a meaningful role in the electoral process, whatever that process might be.

(2) Does the 50-Candidate Threshold Violate Section 3?

38 Consequently, the essential question to be determined is whether the 50-candidate threshold interferes with the capacity of individual citizens to play a meaningful role in the electoral process. In order to answer this question, the Court must answer two prior questions. First, do the members and supporters of political parties that nominate fewer than 50 candidates play a meaningful role in the electoral process? And if so, does the restriction on the right to issue tax receipts for donations received outside the election period, to transfer unspent election funds to the party and to list their party affiliation on the ballot papers interfere with the capacity of the members and supporters of political parties that nominate fewer than 50 candidates to play a meaningful role in the electoral process?

(a) *The Role of Political Parties that Nominate Candidates in Fewer Than 50 Electoral Districts*

39 According to the Court of Appeal, the essential function of a political party only becomes operative where it assumes a level of participation in the electoral process sufficient to indicate that it aspires to participate in the governance of the country subsequent to the election. It is my conclusion that the ability of a political party to make a valuable contribution to the electoral process is not dependent upon its capacity to offer the electorate a genuine "government option". Rather, political parties enhance the meaningfulness of individual participation in the electoral process for reasons that transcend their capacity (or lack thereof) to participate in the governance of the country subsequent to an election. Irrespective of their capacity to influence the outcome of an election, political parties act as both a vehicle and outlet for the meaningful participation of individual citizens in the electoral process.

40 With respect to the ability of a political party to act as an effective vehicle for the meaningful participation of individual citizens in the electoral process, it is important to note that political parties have a much greater capacity than any one citizen to participate in the open debate that the electoral process engenders. By doing so in a representative capacity, on behalf of their members and supporters, political parties act as a vehicle for the participation of individual citizens in the political life of the country. Political parties ensure that the ideas and opinions of their members and supporters are effectively represented in the open debate occasioned by the electoral process and presented to the electorate as a viable option. If those ideas and opinions are not subsequently adopted by the government of the day, it is not because they have not been considered, but, rather, because they have received insufficient public support.

41 Importantly, it is not only large political parties that are able to fulfil this function. It likely is true that a large party will be able to play a larger role in the open discourse of the electoral process, but it does not thereby follow that the capacity of a political party to represent the ideas and opinions of its members and supporters in the electoral process is dependent upon its capacity to offer the electorate a "government option". Large or small, all political parties are capable of introducing unique interests and concerns into the political discourse. Consequently, all political parties, whether large or small, are capable of acting as a vehicle for the participation of individual citizens in the public discourse that animates the determination of social policy.

42 For example, marginal or regional parties tend to dissent from mainstream thinking and to bring to the attention of the general public issues and concerns that have not been adopted by national parties. They might exert less influence than the national parties, but still can be a most effective vehicle for the participation of individual citizens whose preferences have not been incorporated into the political platforms of national parties. It is better that an individual citizen have his or her ideas and concerns introduced into the open debate of the electoral process by a political party with a limited geographical base of support than not to have his or her ideas and concerns introduced into that debate by any political party at all.

43 In respect of their ability to act as an effective outlet for the meaningful participation of individual citizens in the electoral process, the participation of political parties in the electoral process also provides individuals with the opportunity to express an opinion on governmental policy and the proper functioning of public institutions. A vote for a candidate nominated by a particular party is an expression of support for the platform or policy perspectives that the party endorses. The participation of political parties thereby enhances the capacity of individual citizens to express an opinion as to the type of country that they would like Canada to be through the exercise of the right to vote.

44 Once again, the capacity of a political party to provide individual citizens with an opportunity to express an opinion on governmental policy and the proper functioning of public institutions is not dependent upon its capacity to participate in the governance of the country subsequent to an election. As the preceding paragraph suggests, participation as a voter is not only about the selection of elected representatives. Irrespective of its effect on the outcome of an election, a vote for a particular candidate is an expression of support for a particular approach or platform. Whether that vote contributes to the election of a candidate or not, each vote in support of that approach or platform increases the likelihood that the issues and concerns underlying that platform will be taken into account by those who ultimately implement policy, if not now then perhaps at some point in the future.

45 As a consequence, there is no reason to think that political parties that have not satisfied

the 50-candidate threshold do not act as an effective outlet for the meaningful participation of individual citizens in the electoral process. There is no correlation between the capacity of a political party to offer the electorate a government option and the capacity of a political party to formulate a unique policy platform for presentation to the general public. In each election, a significant number of citizens vote for candidates nominated by registered parties in full awareness that the candidate has no realistic chance of winning a seat in Parliament — or that the party of which she or he is a member has no realistic chance of winning a majority of seats in the House of Commons. Just as these votes are not "wasted votes", votes for a political party that has not satisfied the 50-candidate threshold are not wasted votes either. As a public expression of individual support for certain perspectives and opinions, such votes are an integral component of a vital and dynamic democracy.

46 It is thus my conclusion that the members and supporters of political parties that nominate candidates in fewer than 50 electoral districts do play a meaningful role in the electoral process. They are both a vehicle for the participation of individual citizens in the open debate occasioned by the electoral process and an outlet for the expression of support for political platforms that are different from those adopted by political parties with a broad base of support. The question that thus arises is whether the 50-candidate threshold interferes with the right of such citizens to play a meaningful role in the electoral process.

(b) *The Impact of the 50-Candidate Threshold*

47 As outlined earlier, the effect of the 50-candidate threshold is to extend the benefits of registration only to those parties that have nominated candidates in 50 electoral districts. At issue in this appeal are the rights of candidates to issue tax receipts for donations received outside the election period, to transfer unspent election funds to the party and to include their party affiliation on the ballot papers. The question to be determined is whether withholding these benefits from candidates of parties who have not met the 50-candidate threshold undermines the right of each citizen to meaningful participation in the electoral process. In each instance, it is my opinion that the threshold does, in fact, have this effect.

(i) The Right to Issue Tax Receipts and to Retain Unspent Election Funds

48 I begin by noting that it is not my position that s. 3 imposes upon Parliament a freestanding obligation to extend to political parties the right to issue tax credits for donations received outside the election period or to extend to candidates the right to transfer unspent election funds to the party. Section 3 prevents Parliament from interfering with the right of each citizen to play a meaningful role in the electoral process; it does not impose upon Parliament an obligation to enact legislation that enhances the capacity of political parties to raise funds for the purpose of communicating the ideas and opinions of its members and supporters to the general public. However, legislation that bestows a benefit upon some political parties, but not others, requires scrutiny. In this instance, it is only because Parliament has extended these benefits to political parties that satisfy the 50-candidate threshold that its consequent

failure to extend these benefits to political parties that do not satisfy the threshold constitutes an infringement of s. 3.

49 The premise underlying this conclusion is a fairly simple one. Owing to the competitive nature of the electoral process, the capacity of one citizen to participate in the electoral process is closely connected to the capacity of other citizens to participate in the electoral process. The reason for this is that there is only so much space for political discourse; if one person "yells" or occupies a disproportionate amount of space in the marketplace for ideas, it becomes increasingly difficult for other persons to participate in that discourse. It is possible, in other words, that the voices of certain citizens will be drowned out by the voices of those with a greater capacity to communicate their ideas and opinions to the general public.

50 It is thus my conclusion that s. 3 imposes on Parliament an obligation not to enhance the capacity of one citizen to participate in the electoral process in a manner that compromises another citizen's parallel right to meaningful participation in the electoral process. Where legislation extends a benefit to some citizens, but not to others, it is necessary to consider carefully the impact of that legislation on the citizens who have not received the benefit. If the legislation interferes with the right of certain citizens to play a meaningful role in the social discourse and dialogue that the electoral process engenders, it is inconsistent with s. 3 of the *Charter*.

51 Put differently, one might say that s. 3 imposes on Parliament an obligation not to interfere with the right of each citizen to participate in a fair election. As the Court observed in *Libman*, *supra*, at para. 47, electoral fairness is a fundamental value of democracy:

> The principle of electoral fairness flows directly from a principle entrenched in the Constitution: that of the political equality of citizens. . . . Elections are fair and equitable only if all citizens are reasonably informed of all the possible choices and if parties and candidates are given a reasonable opportunity to present their positions. . . .

Importantly, this requirement of fairness is not synonymous with formal equality: see the *Saskatchewan Reference*, *supra*, in which the Court determined that s. 3 does not require absolute voter parity. It is not enough to offend s. 3 that the legislation differentiates between one citizen and another, or one political party or another. It also is necessary that the differential treatment have an adverse impact upon the applicant's right to play a meaningful role in the electoral process.

52 The effect of the restriction on the right to issue tax receipts for donations received outside

the election period is that parties that have satisfied the 50-candidate threshold are able to raise more funds than they would otherwise be able to raise. Similarly, the effect of the restriction on the right to transfer unspent election funds to the party rather than the Receiver General is that only parties that have satisfied the 50-candidate threshold are able to retain unspent election funds. In each instance, the effect of the threshold is that political parties that have satisfied the threshold requirement have more resources at their disposal for the purpose of communicating their ideas and opinions to the general public. The flip side of the coin is that it is even more difficult for a party that has not satisfied the 50-candidate threshold to publicize its own ideas and views. As the Court observed in *Libman*, *supra*, at para. 47, there already is reason to be concerned that the most affluent parties will dominate the public discourse and deprive their opponents of a reasonable opportunity to speak and to be heard. Legislation that augments this disparity increases the likelihood that the already marginalized voices of political parties with a limited geographical base of support will be drowned out by mainstream parties with an increased ability to both raise and retain election funds.

53 This, in turn, diminishes the capacity of the individual members and supporters of such parties to play a meaningful role in the electoral process. As discussed above, political parties act as a vehicle for the participation of individual citizens in the electoral process; they are the primary mechanism by which individual citizens introduce their own ideas and opinions into the public dialogue that elections spawn. Legislation that contributes to a disparity in the capacity of the various political parties to participate in that dialogue ensures that some persons have a more effective vehicle for their ideas and opinions than others. The 50-candidate threshold thus infringes s. 3 of the *Charter* by decreasing the capacity of the members and supporters of the disadvantaged parties to introduce ideas and opinions into the open dialogue and debate that the electoral process engenders.

54 The restriction on these benefits has a more general adverse effect as well. The right to play a meaningful role in the electoral process includes the right of each citizen to exercise the right to vote in a manner that accurately reflects his or her preferences. In order to exercise the right to vote in this manner, citizens must be able to assess the relative strengths and weaknesses of each party's platform — and in order to assess the relative strengths and weaknesses of each party, voters must have access to information about each candidate. As a consequence, legislation that exacerbates a pre-existing disparity in the capacity of the various political parties to communicate their positions to the general public is inconsistent with s. 3. This, however, is precisely the effect of withholding from political parties that have not satisfied the 50-candidate threshold the right to issue tax receipts for donations received outside the election period and the right to retain unspent election funds. By derogating from the capacity of marginal or regional parties to present their ideas and opinions to the general public, it undermines the right of each citizen to information that might influence the manner in which she or he exercises the right to vote.

(ii) Withholding the Right to Include Party Affiliation on the Ballot Papers

55 The impact of the 50-candidate threshold on the right of candidates to include their party affiliation on the ballot papers has a similar effect on the right of each citizen to play a meaningful role in the electoral process. First, withholding this benefit from parties that have not satisfied the 50-candidate threshold diminishes the capacity of individual citizens to participate in the political discourse. There is a close connection between the capacity of the members and supporters of a political party to influence policy and the support that the party receives in any given election. Even if the party does not win a single seat in Parliament, the greater the number of votes that it receives the more likely it is that other citizens and the elected government will take seriously the ideas and opinions that it endorses. Legislation that reduces the number of votes that a candidate nominated by a particular party might receive interferes with the capacity of the members and supporters of that party to participate in the public discourse through participation in the selection of elected representatives. For the reasons below, it is my conclusion that the restriction on the right of a candidate to list his or her party affiliation on a ballot paper likely does have this effect.

56 As Molloy J. observed, political parties play such a prominent role in our democratic system that the choice of candidates by some voters is based largely, if not exclusively, on party affiliation. Many individuals are unaware of the personal identity or background of the candidate for whom they wish to vote. In the absence of a party identifier on the ballot paper, it is possible that certain voters will be unable to vote for their preferred candidate. Furthermore, it also is possible that voters who are familiar with the identity of the candidate of a particular party will be discouraged from voting for a candidate nominated by a non-registered party. Owing to the prominence of political parties in our system of representative democracy, affiliation with an officially recognized party is highly advantageous to individual candidates. In the minds of some voters, the absence of a party identifier might make candidates nominated by parties that have not satisfied the 50-candidate threshold a less attractive option. It might create the impression that the candidate is not, in fact, affiliated with a political party, or that the political party with which she or he is affiliated is not a legitimate political party. In each instance, the restriction on the right of candidates to list their party affiliation interferes with the capacity of non-registered parties to compete in the electoral process.

57 For similar reasons, the restriction on the right of candidates to include their party affiliation on the ballot paper also undermines the right of each citizen to make an informed choice from among the various candidates. In order to make such a choice, it is best that a voter have access to roughly the same quality and quantity of information in respect of each candidate. In our system of democracy, the political platform of an individual candidate is closely aligned with the political platform of the party with which she or he is affiliated, and thus the listing of party affiliation has a significant informational component. Thus, legislation that allows some candidates to list their party affiliation yet prevents others from doing the same is inconsistent with the right of each citizen to exercise his or her right to vote in a manner that accurately reflects his or her actual preferences. It violates s. 3 by ensuring that voters are better informed of the political platform of some candidates than they are of others.

58 For these reasons, I conclude that the 50-candidate threshold does infringe s. 3 of the *Charter*. It undermines both the capacity of individual citizens to influence policy by introducing ideas and opinions into the public discourse and debate through participation in the electoral process, and the capacity of individual citizens to exercise their right to vote in a manner that accurately reflects their

preferences. In each instance, the threshold requirement is inconsistent with the purpose of s. 3 of the *Charter*: the preservation of the right of each citizen to play a meaningful role in the electoral process.

B. *Is the Infringement Saved by Section 1 of the Charter?*

59 In order to justify the infringement of a *Charter* right under s. 1, the government must demonstrate that the limitation is reasonable and demonstrably justifiable in a free and democratic society. This involves a two-step analysis, pursuant to *Oakes*, *supra*, and related cases: *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *Thomson Newspapers*, *supra*, and *M. v. H.*, [1999] 2 S.C.R. 3. Throughout this process the burden rests on the government. The government first must demonstrate that the objective of the legislation is sufficiently pressing and substantial to warrant violating a *Charter* right. The objectives must be neither "trivial" nor "discordant with the principles integral to a free and democratic society": *Oakes*, *supra*, at p. 138. Once this has been established, the government must then demonstrate that the infringement is proportionate, namely, that the legislation is rationally connected to the objective, that it minimally impairs the *Charter* right in question, and that the salutary benefits of the legislation outweigh the deleterious effects.

60 Before beginning this analysis, I note this Court's prior conclusion that limits on s. 3 require not deference, but careful examination: *Sauvé*, *supra*, at para. 9. As the Court observed in that case, s. 3 is one of the *Charter* rights that cannot be overridden by the invocation of s. 33 of the *Charter*. This highlights the extent to which s. 3 is fundamental to our system of democracy and indicates that great care must be exercised in determining whether or not the government has justified a violation of s. 3.

61 In his factum, the Attorney General of Canada submits that the objective of the 50-candidate threshold is "to enhance the effectiveness of Canadian elections, in both their process *and* outcome" (emphasis in original). More specifically, the Attorney General submits that the 50-candidate threshold advances three separate goals: (i) to improve the effectiveness of the electoral process; (ii) to protect the integrity of the electoral financing regime; and (iii) to ensure that the process is able to deliver a viable outcome for our form of responsible government. To provide a more complete analysis of the federal government's arguments under s. 1, I deal with each objective advanced separately. Consequently, in the analysis below, I consider each of the proposed objectives in turn to determine first whether the government has demonstrated that any of the specific objectives is of pressing and substantial importance and, second, that the violation of s. 3 is proportionate.

(1) Improvement of the Electoral Process

62 The first objective that the Attorney General relies upon is the improvement of the electoral process through the public financing of political parties. To the extent that this actually is the objective of the 50-candidate threshold, the objective is a pressing and substantial one. The public financing of political parties makes a number of valuable contributions to our system of democracy.

63 The effective functioning of the electoral process requires that political parties have access to considerable financial resources. For the reasons discussed above, it is essential that voters are well informed. Voters that are not well informed cannot exercise their right to vote in a manner that reflects their actual preferences. Political parties, however, cannot ensure that voters are well informed unless they have access to sufficient financial resources to communicate their ideas to the general public. And many would argue that it is not only beneficial that political parties have access to adequate financial resources, but also that a significant percentage of those resources be received from individual citizens. The present law is based on the theory that candidates who have received modest contributions from a broad range of sources, including individuals, are more accountable to the citizens whose interests they ultimately represent than candidates who receive large contributions from a limited number of sources, such as business organizations and unions: *Report of the Committee on Election Expenses* (the Barbeau Committee) (1966), at pp. 33-34.

64 Thus, I agree that legislation that seeks to encourage individual citizens to donate funds to political parties advances a pressing and substantial objective. However, it is not the validity of legislation that encourages individual citizens to donate funds to political parties that is in question. Legislation that prevents certain political parties from issuing tax receipts or retaining unspent election funds does not encourage individual citizens to donate funds to political parties, but, rather, actively discourages the members and supporters of those parties from making such contributions. There is no connection whatsoever between the 50-candidate threshold and the objective of improving the electoral process through the public financing of political parties.

65 While the broad objective of "improving the electoral process through the public financing of political parties" will, therefore, not suffice to justify the legislation, it is possible that the more specific objective of ensuring that the electoral process is improved in what might be called a cost-efficient manner would satisfy the *Oakes* test. As an initial matter, I am apprehensive about concluding that the objective of ensuring the cost-efficiency of the tax credit scheme is sufficiently pressing and substantial to warrant violating a *Charter* right. There is no meaningful distinction between violating a *Charter* right for the purpose of advancing an otherwise valid objective in a cost-efficient manner and violating a *Charter* right for the purpose of preserving the public purse. It is not clear, however, that preserving the public purse is an objective that is sufficiently pressing and substantial to satisfy this branch of the *Oakes* test. As Lamer C.J. wrote in *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 709, "budgetary considerations cannot be used to justify a violation under s. 1"; see also *Egan v. Canada*, [1995] 2 S.C.R. 513, at para. 99; and *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3.

66 At the same time, I do not wish to rule out the possibility that there might be instances in which the potential impact upon the public purse is of sufficient magnitude to justify limiting the rights of individual citizens. For the sake of this analysis, then, I believe it prudent to accept that ensuring the cost-efficiency of the tax credit scheme is a pressing and substantial concern. The question, then, is whether the 50-candidate threshold is proportional, that is, whether it is an acceptable means of ensuring the cost-efficiency of the financing regime. More specifically, is the threshold requirement rationally connected to the objective, does it impair s. 3 as minimally as possible, and do the benefits of the threshold outweigh its effects on the *Charter* rights of the individual citizen?

67 In respect of the restriction on the right of the candidates to transfer unspent election funds to the party and to list their party affiliation on the ballot papers, it is impossible to discern any connection whatsoever between the threshold requirement and the objective of ensuring the cost-efficiency of public financing. In neither instance is the benefit made available for the purpose of encouraging individual citizens to donate funds to political parties. Accordingly, it is impossible to conclude that the objective of the restriction is to ensure the cost-efficiency of the public financing regime. This objective can provide no justification for restricting the right of candidates to transfer unspent election funds to the party or to include party identifiers on their ballot papers.

68 At first glance, it might appear that the restriction on the right of political parties to issue tax receipts for donations received outside the election period is rationally connected to the objective of ensuring the cost-efficiency of the public financing regime. After all, each tax credit issued does reduce the country's tax revenues. Nonetheless, it is important to note that the threshold requirement has no impact whatsoever upon the potential overall burden of the tax credit scheme on the public purse. Even with the threshold in place, it still is possible for every citizen to obtain the full $500 credit that is available in respect of donations to political parties. Further, there is nothing in the *Elections Act* that would prevent each citizen from making a donation to a registered political party. The connection between legislation that has no impact upon either the number of citizens allowed to claim the tax credit or the size of the credit and the objective of ensuring the cost-efficiency of the tax credit scheme is tenuous at best. Moreover, the government has provided no evidence to substantiate its claim that the threshold actually improves the cost-efficiency of the tax credit scheme. It is thus my conclusion that the rational connection test had not been satisfied.

69 Even if the government was able to advance sufficient evidence to substantiate its claim that the threshold requirement is rationally connected to the advanced objective, the legislation still fails the minimal impairment test. If Parliament believes that the costs associated with the tax credit scheme are prohibitively high, a more appropriate means by which to address this problem would be to reduce the amount that each citizen is entitled to claim in respect of donations to political parties. This would not only be a more effective means of limiting the costs associated with the tax credit scheme, but it also would be a means of achieving that objective that did not result in the violation of any citizen's right to play a meaningful role in the electoral process. Where the same objective can be achieved without violating any citizen's *Charter* rights, the minimal impairment test of the *Oakes* test has not been satisfied.

70 Finally, even if the first two branches of the proportionality test had been met, the benefits associated with the reduced costs of the tax credit scheme still would not outweigh the deleterious effects on the right of individual citizens to play a meaningful role in the electoral process. The right to participate in the selection of elected representatives is one of the touchstones of a free and democratic state: see *Sauvé*, *supra*, at para. 58, in which McLachlin C.J. wrote that a violation of s. 3 undermines both the legitimacy and effectiveness of government. The deleterious effects associated with a violation of s. 3 are substantial. Conversely, the government has advanced no evidence indicating that the 50-candidate threshold provides any significant benefit to the public purse. Rather, owing to the fact that political parties that nominate candidates in fewer than 50 electoral districts typically have a relatively small base of support, one would expect the percentage of political donations received by non-registered parties to be relatively insignificant — as one would thereby expect the savings to the public purse to be relatively insignificant. If the right of individual citizens to play a meaningful role in the electoral process is to be limited for fiscal reasons, the savings would have to be much more substantial than those associated with the restriction on the right of non-registered parties to issue tax receipts to individual citizens for donations received outside the election period.

(2) Protecting the Integrity of the Electoral Financing Regime

71 The Attorney General submits that a second objective of the 50-candidate threshold is the preservation of the integrity of the electoral financing regime. It is his submission that the 50-candidate threshold is necessary to ensure that third parties that have no genuine interest in participating in the electoral process do not abuse the electoral financing regime.

72 This Court already has determined that preserving the integrity of the electoral process is a pressing and substantial concern in a free and democratic state. In *Harvey*, *supra*, in which the Court considered the constitutional validity of provincial legislation that prohibited members of New Brunswick's Legislative Assembly from holding or seeking office for a period of five years subsequent to conviction pursuant to the New Brunswick *Elections Act*, R.S.N.B. 1973, c. E-3, La Forest J. wrote as follows, at para. 38:

> I have no doubt that the primary goal of the impugned legislation is to maintain and enhance the integrity of the electoral process. Nor do I doubt that such an objective is always of pressing and substantial concern in any society that purports to operate in accordance with the tenets of a free and democratic society.

The systems and regulations that govern the process by which governments are formed should not be easily compromised. Electoral financing is an integral component of that process, and thus it is of great

importance that the integrity of the electoral financing regime be preserved. Ensuring that funds raised pursuant to the *Elections Act* are not misused is a constitutionally valid objective.

73 The next question to be determined is whether there is a rational connection between the impugned legislation and the constitutionally valid objective: has the government demonstrated that the 50-candidate threshold is rationally connected to the objective of preserving the integrity of electoral financing regime? Once again, it is immediately clear that this objective provides no justification for the restriction on the right of candidates to list their party affiliation on the ballot papers. The restriction on the right of candidates to list their party affiliation on their ballot papers simply does not engage the electoral financing regime, let alone advance the objective of ensuring its integrity. Although it is perhaps less obvious, the same is true of the restriction on the right to issue tax receipts and the right to transfer unspent election funds to the party.

74 In respect of the restriction on the right to issue tax receipts, it is the Attorney General's submission that the threshold requirement prevents organizations that have no genuine interest in the electoral process from raising funds pursuant to s. 127(3) of the *Income Tax Act*. There would seem to be two possible aspects to this submission. The first is that failure to satisfy the 50-candidate threshold is evidence that a political party has no genuine interest in the electoral process. The second is that the 50-candidate threshold actively discourages organizations that have no electoral aim from seeking registered party status solely for the purpose of obtaining the right to issue tax receipts. Neither aspect of this submission provides a sufficient basis for concluding that the threshold requirement is rationally connected to the stated objective.

75 First, there is no merit whatsoever to the claim that failure to satisfy the 50-candidate threshold is evidence that a political party has no genuine interest in the electoral process. For all the reasons discussed above, a political party need not nominate candidates in 50 electoral districts in order to play a meaningful role in the electoral process. History reveals instances in which political parties that were once prominent in fielding candidates or electing members subsequently failed to meet the 50-candidate threshold. Most recently, the Communist Party of Canada failed to satisfy the threshold in 1993, as did the Social Credit Party in 1988. As these examples indicate, the 50-candidate threshold is an inadequate mechanism for determining whether an organization is a legitimate political party, with a genuine intention of participating in the electoral process.

76 The government also has failed to demonstrate that the threshold prevents third parties or lobby groups from nominating candidates for the sole purpose of obtaining the right to issue tax receipts for donations received outside the campaign period. I first note that all candidates, whether nominated by a registered party or not, are entitled to issue tax receipts for donations received during the campaign period. If third parties or lobby groups have not already nominated candidates for the purpose of obtaining this benefit, it seems unlikely that they would nominate candidates for the purpose of obtaining the right to issue tax receipts for donations received outside the election period. In addition,

there are a substantial number of obligations that a registered party must comply with, such as submitting audited financial statements, audited financial transactions returns and audited election expenses returns. Absent evidence indicating that these requirements are not sufficient to prevent third parties from seeking registered party status for the sole purpose of abusing the tax credit scheme, there is no basis for concluding that the 50-candidate threshold actually advances the objective of preventing the misuse of the electoral financing regime.

77 In respect of the restriction on the right of candidates to transfer unspent election funds to the party, the respondent submits that a threshold requirement is necessary because non-registered parties are not subject to the reporting requirements of the *Elections Act*. This submission, however, is entirely circular. After all, the threshold requirement is the only reason that parties that nominate fewer than 50 candidates are not subject to the reporting requirements. If the reporting requirements already address the misuse of unspent election funds, it is unnecessary to require certain parties to transfer unspent election funds to the Receiver General. If, on the other hand, the reporting requirements are insufficient to prevent the misuse of election funds, the threshold requirement would do little to preserve the integrity of the electoral financing regime. The integrity of the electoral financing regime is not preserved by requiring but an extremely small subset of unspent election funds to be paid to the Receiver General.

78 Furthermore, even if the restrictions on the right to issue the tax receipt and the right to retain unspent election funds prevent the misuse of the electoral financing regime, the legislation fails the minimal impairment test. In each instance, the government has failed to demonstrate that it could not achieve the same results without violating s. 3 of the *Charter*. Consider, for example, the auditors and other investigators that the government already has at its disposal. There is no reason to think that auditors would not be equally capable, if not more so, of detecting, and thereby preventing, the misuse of funds raised pursuant to the electoral financing regime. The misuse of funds, after all, is precisely the sort of mischief that auditors are trained to uncover, and which the state can properly criminalize in order to preserve the integrity of the electoral financing regime. The logical inference is that precisely the same result could be achieved through strict spending rules and the use of auditors. If the same result could be achieved without violating the *Charter*, the minimal impairment requirement has not been satisfied.

(3) Ensuring a Viable Outcome for Our Form of Responsible Government

79 The third objective advanced by the respondent is that of ensuring that the electoral process results in a viable outcome for our form of responsible government. The essence of this submission is that a certain type of outcome, considered from a non-partisan perspective, is better suited to our system of democracy. In particular, what the respondent would seem to envision is the formation of a majority government that has aggregated preferences on a national scale. It is the respondent's submission that majority governments provide more effective governance than governments that consist of coalitions

between or among various political parties. On this view, legislation that increases the likelihood of such a government is legislation that advances a pressing and substantial objective.

80 Articulating the objective of the legislation in this manner is extremely problematic. In order to advance this objective, the legislation must interfere with the right of individual citizens to play a meaningful role in the electoral process to such an extent that it increases the likelihood that candidates nominated by national parties will be elected, thereby decreasing the likelihood that candidates nominated by regional or marginal parties will be elected. As noted above, in *Oakes*, *supra*, Dickson C.J. concluded that the objective of the impugned legislation must not be "discordant" with the principles integral to a free and democratic society. Legislation enacted for the express purpose of decreasing the likelihood that a certain class of candidates will be elected is not only discordant with the principles integral to a free and democratic society, but, rather, is the antithesis of those principles. Consequently, it is difficult to accept that the objective of ensuring that the electoral process results in a particular outcome is sufficiently pressing and substantial to warrant the violation of a *Charter* right.

81 There also are difficulties associated with the government's submission that a majority government that has aggregated preferences on a national scale is the only form of viable government in our system of democracy. Between 1882 and 1983 there were nine minority governments in the British Parliament. In Canada, there have been eight minority federal governments and a number of provincial minority governments. The Attorney General of Canada has presented no evidence that demonstrates that such governments are less democratic than majority governments, or that they provided less effective governance than majority governments. Importantly, I do not mean to suggest that Parliament must choose an electoral system that the Court believes will result in "good" or "better" governance. The *Charter* aside, the choice among electoral processes is, as LeBel J. states, a political one – and not one in which the Court should involve itself. But if Parliament interferes with the right of each citizen to play a meaningful role in that process, it must be able to point to a pressing and substantial objective that it seeks to advance. In the absence of compelling reason to assert that a particular outcome will result in better governance, there is no basis on which to conclude that legislation that seeks to obtain that outcome advances an objective that is sufficiently pressing and substantial to warrant interfering with the right of each citizen to play a meaningful role in the electoral process.

82 At the same time, one can point to arguments to state that there are collective benefits associated with majority governments. For example, it is possible that the continuity and stability associated with majority governments results in better governance. The increased ease with which majority governments are able to implement policy might ensure that such governments are able to advance their objectives more effectively than a coalition, again resulting in better governance. This is sometimes argued to be a benefit of the Westminster model of parliamentary democracy, reflected in the preamble to the *Constitution Act, 1867*, giving Canada "a Constitution similar in Principle to that of the United Kingdom". It also is possible that there are benefits associated with factors unique to the Canadian political landscape. Or perhaps it is simply that this is a system that Canadians have grown accustomed to — and that there exists an inverse relationship between public confidence in government and the fragmentation of Parliament. Accordingly, even if the election of a strong national government is not the only viable outcome of the electoral process, it at least is possible that there are certain benefits

associated with the formation of a majority government that has aggregated preferences on a national basis.

83 But even if I were willing to accept that the collective benefits associated with the formation of a majority government are of sufficient magnitude to warrant interference with the right of each to play a meaningful role in the electoral process, serious difficulties remain. For the reasons discussed below, I conclude that the legislation fails the proportionality branch of the *Oakes* test. As a consequence, I believe it prudent to leave the question of whether majority building is a pressing and substantial objective unanswered at this time. Even if there are conceptual difficulties associated with the objective of ensuring that the electoral process results in a particular outcome, I would not want to foreclose the possibility that the government might be able to demonstrate that there is a reasonable basis for its belief that majority governments are more effective than minority governments.

84 In respect of the proportionality branch of the *Oakes* test, the first question to be determined is whether the 50-candidate threshold is rationally connected to the stated objective. On its face, it would appear that the legislation is rationally connected to the objective of majority building. After all, a large part of the reason that it was found to violate s. 3 is that it creates a competitive advantage for parties with a broad geographical base of support. Common sense would seem to suggest that legislation that makes it difficult for regional or marginal parties to garner support and to build political momentum is rationally connected to the objective of increasing the likelihood of a majority government.

85 Importantly, there exists no evidence that the 50-candidate threshold is a cause of this phenomenon. It is equally possible, if not more so, that most voters do not feel that their interests are reflected in the platforms of non-registered political parties, or would prefer to cast a vote for a political party that has a genuine opportunity of winning a substantial number of seats in Parliament. Indeed, it seems unlikely that removing the threshold requirement would have a significant impact, if it would have any impact at all, on the likelihood that the electoral process will result in the election of a majority government, either now or at any time in the foreseeable future. The more likely threat to majority governments is not the participation of regional or marginal parties that have failed to satisfy the 50-candidate threshold, but, rather, the proliferation of registered political parties generally. The *Elections Act*, however, imposes no limit on the number of political parties that qualify for registered party status.

86 Absent any evidence that the full participation of political parties that fail to satisfy the 50-candidate threshold would, in fact, decrease the likelihood that the electoral process will result in the formation of a majority government, the threshold requirement cannot reasonably be expected to advance the stated objective. For this reason alone, even if the objective in question was pressing and substantial, the 50-candidate threshold would fail the first branch of the proportionality test, namely, the rational connection test.

87 But even if the respondent could prove that the 50-candidate threshold has a meaningful impact on the likelihood that subsequent elections will result in the election of majority governments, it still would be my conclusion that the legislation fails the third branch of the proportionality test: the proportionate effects test. The government has failed to demonstrate that the salutary benefits of the legislation outweigh its deleterious effects.

88 On the one hand, the deleterious effects associated with this legislation are substantial. As discussed above, this legislation has a significant impact on the capacity of candidates nominated by non-registered political parties to communicate their ideas to the electorate. This, in turn, undermines the capacity of individual citizens to introduce ideas and opinions into the public discourse that the electoral process engenders, and to exercise their right to vote in a manner that accurately reflects their preferences. This, however, is not the only effect of the 50-candidate threshold. If the legislation is, in fact, rationally connected to the stated objective, it must do more than interfere with the right of individual citizens to play a meaningful role in the electoral process in order to obtain this objective: it must interfere to such an extent that it results not only in the election of individual candidates who would not otherwise have been elected, but also in the election of majority governments that would not otherwise have been elected. As noted above, it is difficult to reconcile legislation that seeks to have this effect with the principles that are integral to a free and democratic society. Legislation that violates s. 3 for this purpose does great harm to both individual participants and the integrity of the electoral process itself.

89 Legislation with such harmful effects would be difficult to justify. The government would have to point to salutary benefits that outweigh these very significant deleterious effects. More specifically, it is incumbent on the government to demonstrate, either through evidence or argument, that a majority government is likely to provide substantially better governance than a minority government. The government has failed to satisfy this burden. The government has not advanced sufficient evidence to demonstrate that the election of a majority government would result in benefits that outweigh the deleterious effects associated with legislation that violates s. 3 for the purpose of ensuring that the electoral process results in the election of a government that would not otherwise be elected. Nor has it provided a reasoned basis on which to conclude that this is the case. In the absence of either evidence or argument to this effect, it is impossible to conclude that the legislation is justifiable in a free and democratic society.

VI. Disposition

90 In the final analysis, I conclude both that the 50-candidate threshold is inconsistent with the right of each citizen to play a meaningful role in the electoral process, and that the government has failed to justify this violation.

91 However, before I dispose of this appeal I think it important to stress that this decision does not stand for the proposition that the differential treatment of political parties will always constitute a violation of s. 3. Nor does it stand for the proposition that an infringement of s. 3 arising from the differential treatment of political parties could never be justified. Consequently, although the disposition of this case will have an impact on sections of the *Elections Act* that provide access to free broadcast time, the right to purchase reserved broadcast time, and the right to partial reimbursement of election expenses upon receiving a certain percentage of the vote, I express no opinion as to the constitutionality of legislation that restricts access to those benefits. It is possible that it would be necessary to consider factors that have not been addressed in this appeal in order to determine the constitutionality of restricting access to those benefits.

92 In addition, the question also arises as to the number of candidates required to justify restricting access to the three benefits discussed in these reasons. The thrust of the reasons is that no threshold requirement is acceptable. However, I note the recent amendment to the *Elections Act* that reduces the threshold requirement in respect of the right of candidates to list their party affiliation on the ballot papers: S.C. 2001, c. 21, s. 12. Pursuant to this amendment, a political party need only nominate 12 candidates in order for its nominees to obtain the right to include their party affiliation on the ballots. Obviously, the constitutionality of the amended provision is not currently before the Court. It may well be that the government will be able to advance other objectives that justify a 12-candidate threshold. But suffice it to say, the objectives advanced do not justify a threshold requirement of any sort, let alone a 50-candidate threshold.

93 In the result, the appeal is allowed with costs and ss. 24(2), 24(3) and 28(2) of the *Elections Act* are declared unconstitutional. The declaration of unconstitutionality is suspended for 12 months in order to enable the government to comply with these reasons.

94 The constitutional questions are answered as follows:

1. Do ss. 24(3)(*a*) and 28(2) of the *Canada Elections Act*, R.S.C. 1985, c. E-2 (now ss. 370 (1) and 385, S.C. 2000, c. 9) limit the s. 3 *Canadian Charter of Rights and Freedoms* rights of candidates or supporters of non-registered political parties by requiring that, in order to become and remain a registered political party, a party must nominate candidates in at least 50 electoral districts in each general election?

Answer: Yes.

2. If the answer to Question 1 is in the affirmative, is this limitation reasonable and demonstrably justified in a free and democratic society under s. 1 of the *Charter*?

Answer: No.

3. Do ss. 24(3)(*a*) and 28(2) of the *Canada Elections Act*, R.S.C. 1985, c. E-2 (now ss. 370 (1) and 385, S.C. 2000, c. 9) limit the s. 15(1) *Charter* rights of candidates or supporters of non-registered political parties by requiring that, in order to become and remain a registered political party, a party must nominate candidates in at least 50 electoral districts in each general election?

Answer: It is not necessary to answer this question.

4. If the answer to Question 3 is in the affirmative, is this limitation reasonable and demonstrably justified in a free and democratic society under s. 1 of the *Charter*?

Answer: It is not necessary to answer this question.

5. Do ss. 24(3)(*a*) and 28(2) of the *Canada Elections Act*, R.S.C. 1985, c. E-2 (now ss. 370 (1) and 385, S.C. 2000, c. 9) limit the s. 2(*d*) *Charter* rights of candidates or supporters of non-registered political parties by requiring that, in order to become and remain a registered political party, a party must nominate candidates in at least 50 electoral districts in each general election?

Answer: It is not necessary to answer this question.

6. If the answer to Question 5 is in the affirmative, is this limitation reasonable and demonstrably justified in a free and democratic society under s. 1 of the *Charter*?

Answer: It is not necessary to answer this question.

The reasons of Gonthier, LeBel and Deschamps JJ. were delivered by

LEBEL J. —

I. Introduction

95 In this appeal, our Court is called upon to answer important questions about the meaning of the democratic rights enshrined in the *Canadian Charter of Rights and Freedoms*. We must explore the meaning of "effective representation" for the first time outside the context of electoral boundary-drawing. I agree with much of the majority opinion, including Iacobucci J.'s disposition of the case, the remedy he proposes, and the emphasis on "meaningful participation" as a core value that determines the content of s. 3 of the *Charter*. But I must express reservations about the methodology used by my colleague to identify an infringement of s. 3.

96 In my opinion, the sole determinative question at the infringement stage of the analysis cannot be whether the impugned measure "interferes with the capacity of individual citizens to play a meaningful role in the electoral process" (Iacobucci J., at para. 38). Framing the question in this way understates the complexity of effective representation and meaningful participation. Such multifaceted concepts cannot be reduced to the purely individual aspects of political participation, but rather comprise a number of intertwined and often opposed principles. Indeed, as Iacobucci J. himself observes at para. 36, "the mere fact that the legislation . . . restricts the capacity of a citizen to participate in the electoral process" is not enough to establish a violation of s. 3.

97 The proper approach is to apply the analytical template which has emerged from the jurisprudence of this Court and lower courts on electoral boundaries. The methodology developed in the electoral boundaries cases recognizes that the right to vote comprises many factors, and that its content can only be defined through a contextual and historical analysis.

98 Applying that contextual and historical approach to the facts of this case leads to the conclusion that the legislation does further significant democratic values. The challenged provisions form part of the scheme in the *Canada Elections Act*, R.S.C. 1985, c. E-2, for the formal legal recognition and regulation of political parties. This scheme enhances the effectiveness of the party

system which, in turn, is an important component of our democratic form of government. The requirement of nominating 50 candidates tends to benefit parties with a broad appeal, thus encouraging cohesiveness and the aggregation of political will. The importance of these values, deeply rooted as they are in Canadian political culture, is evidenced by their place in our history and existing institutions.

99 In principle, the values enhanced by the impugned measures could be furthered at the price of compromising individual participation to a certain extent. In this case, however, the legislation goes too far in creating unfairness both as between individual voters and as between different regions of the country. Ultimately, the challenged provisions conflict with the right to meaningful participation and are inconsistent with s. 3. But, before setting out my reasons for reaching that conclusion, I must first turn to the definition of the central issue at stake in this appeal, the definition of meaningful participation.

II. Analysis

A. *The Central Issue: The Definition of "Meaningful Participation"*

100 I agree with Iacobucci J. that s. 3 gives every Canadian citizen the right to meaningful participation in free and fair elections. Without such a right, no genuinely democratic system of government can be set up or endure. Citizens' political choices cannot be effectively represented unless they have the opportunity to participate in the process in a meaningful way. My disagreement with the majority is on how this right to meaningful participation is to be defined.

101 I do not agree with an approach that only takes into account the strictly individual aspects of participation in the political process. While I acknowledge the central importance of individual participation, s. 3 is also inherently concerned with the representation of communities, both the various communities that make up Canadian society and the broader community of all Canadians. Participation in the electoral process typically involves individual citizens acting as members of political groups, and alliances both within and between such groups can render participation more meaningful and result in better representation of communities and of national political preferences. Ignoring these communitarian aspects of s. 3 risks creating a distorted picture of the right.

102 It is important, too, to give due attention to the context within which democratic rights are exercised and to the history of Canadian political institutions. In my view, s. 3 must be interpreted in harmony with our political traditions. A purely individualistic approach is difficult to reconcile with the characteristic values of Canadian politics. For this reason, an analysis focussing strictly on the individual aspects of the right appears to depart from the approach this Court adopted in *Reference re*

Provincial Electoral Boundaries (Sask.), [1991] 2 S.C.R. 158 ("*Saskatchewan Reference*"), where the context of our tradition and established political practices was recognized as a source of the meaning of the rights enshrined in s. 3.

103 Although each citizen has a right to meaningful participation, not every government measure with an adverse impact on participation renders it meaningless. Legislation may compromise or interfere with individual participation to a certain extent, without necessarily depriving citizens of meaningful representation. (In fact, it is difficult to conceive of an electoral system that does not constrict any citizen's individual participatory freedom in any way at all.) Such compromises may be acceptable if they are necessary for pragmatic reasons or if they serve to further other democratic values, which may be connected to the collective, communitarian or systemic aspects of s. 3. We should give due recognition to the competing values between which the government must choose in designing the electoral system, so as not to imply that it is constitutionally required to maximize one admittedly important value — that of individual participation — alone.

B. *The Saskatchewan Reference*

104 Most of the case law on s. 3 rights to this point has dealt with legislation that directly denies the right to vote to a particular group of people (prison inmates in *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519, 2002 SCC 68; mentally incompetent persons in *Canadian Disability Rights Council v. Canada*, [1988] 3 F.C. 622 (T.D.); federally appointed judges in *Muldoon v. Canada*, [1988] 3 F.C. 628 (T.D.); absentee voters in *Re Hoogbruin and Attorney-General of British Columbia* (1985), 24 D.L.R. (4th) 718 (B.C.C.A.); and persons convicted of offences involving corrupt electoral practices in *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876). The impugned legislation in those cases literally contradicted the language of s. 3, which states that every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein. The question of whether the challenged limitations of those rights were consistent with Canada's democratic values therefore naturally fell to be considered in connection with s. 1 of the *Charter*.

105 Only on one previous occasion has this Court considered a challenge under s. 3 of the *Charter* to legislation that regulated the electoral process without literally denying anyone the right to vote or to be a candidate. That case was the *Saskatchewan Reference*, *supra*. At issue were the electoral boundaries for Saskatchewan's Legislative Assembly, which provided for a prescribed number of rural, northern and urban ridings, and permitted significant disparities between the different types of ridings in the number of voters per district. One northern district had 6,309 voters, while one of the urban districts had 12,567. In effect, a vote in the former district was "worth" about twice as much as a vote in the latter.

106 This Court acknowledged that s. 3 guarantees more than "the bare right to place a ballot in a box", as the present Chief Justice, when she was Chief Justice of the Supreme Court of British Columbia, put it in an earlier case on the issue of electoral boundaries (*Dixon v. British Columbia (Attorney General)*, [1989] 4 W.W.R. 393, at p. 403). For the right to vote to have real substance, it must be exercised in an electoral system that gives genuine meaning to each citizen's vote. Thus the guarantee in s. 3 must implicitly include such basic incidents as the right to cast a vote in private, and the right to have that vote honestly counted and recorded (*Saskatchewan Reference*, *supra*, at p. 165, *per* Cory J., in dissent but not on this point). But it includes more than that. It implies that every Canadian citizen is entitled to "effective representation" through the democratic process. *I* would add that effective representation can only be achieved if every citizen has the opportunity for meaningful participation in elections.

107 At the heart of the right to vote is the citizen's entitlement to an opportunity to vote in fair elections. As the Court recognized in the *Saskatchewan Reference*, this means that each citizen's vote must be relatively equal in weight to that of every other citizen: "A system which dilutes one citizen's vote unduly as compared with another citizen's vote runs the risk of providing inadequate representation to the citizen whose vote is diluted" (*Saskatchewan Reference*, *supra*, at p. 183).

108 Voter parity itself is not, however, the objective of s. 3, but only one of the factors, albeit a factor of primary importance, to be taken into account in determining whether effective representation has been provided. McLachlin J. identified two situations where voter parity might be deviated from without offending s. 3: when pragmatic considerations required such deviation, and when it enabled "the provision of more effective representation" (*Saskatchewan Reference*, *supra*, at p. 185). She held that effective representation was defined not only by fairness as between individual voters, but also by other democratic values that can be in tension with voter parity – the relevant consideration in that case being the special challenge of ensuring adequate representation of remote and sparsely populated areas. McLachlin J. observed that these countervailing or competing democratic values could include "geography, community history, community interests and minority representation", and that the list was not closed (*Saskatchewan Reference*, *supra*, at p. 184).

109 Lower courts have applied the principles set out in the *Saskatchewan Reference* and worked out a sophisticated methodology for evaluating the constitutionality of electoral boundaries: see *MacKinnon v. Prince Edward Island* (1993), 104 Nfld. & P.E.I.R. 232 (P.E.I.S.C.); *Reference re Electoral Boundaries Commission Act (Alberta)* (1991), 83 Alta. L.R. (2d) 210 (C.A.) ("*Alberta Reference*"); and *Reference re Electoral Divisions Statutes Amendment Act, 1993 (Alberta)* (1994), 24 Alta. L.R. (3d) 1 (C.A.). Courts have commented on the complexity of the task, one which involves reconciling democratic values that exist in tension with and sometimes directly contradict each other.

110 In the *Alberta Reference*, *supra*, for example, the Alberta Court of Appeal observed, at p. 216, that "the factors made relevant by the principles of parity and effective representation are both

complicated and conflicting, and this mandates some balancing". The statute which was the subject of the reference aimed to avoid a rigid division between urban and rural areas. The legislative committee that recommended this approach thought that such divisions encouraged urban and rural voters to pursue their interests as adversarial factions. The Court of Appeal remarked that this situation illustrated the difficulty of the concept of effective representation. While ensuring that minorities have an effective voice is an important democratic value, so is the building of broadly based consensus. As the court explained, at p. 216:

> If every group in society with a community of interest can elect its own member of the Legislature, they may not be encouraged to develop the mutual understanding and respect that is essential to a healthy democratic life. Shared representation might encourage mutual respect, just as it might also permit the repression of the voice of those who become permanent minorities.

C. *Saskatchewan Reference Principles in the Context of this Case*

111 In this case, our Court must once again assess legislation that affects the exercise of democratic rights without literally denying them, but for the first time in a context outside the now relatively well-charted terrain of electoral boundaries. Here, the context is the regulation of political parties and the system of privileges and obligations that parties are subject to in our electoral system.

112 The case raises some complex issues that are absent from the electoral boundaries context. The direct effect of regulation of political parties is felt by the parties themselves and by their candidates for elective office. In this manner, this appeal engages the second right set out in s. 3, the right to be qualified for membership in Parliament or a legislative assembly (or, more simply, the right to be a candidate). The right to vote is also at play because, as an indirect consequence of the unequal treatment of parties, their supporters are treated unequally. Since an incentive to support registered parties also penalizes supporting unregistered ones, the impugned legislation constrains voters' freedom in choosing which party to support.

113 The key value on which this constitutional challenge is based is not equality of voting power *per se*, but fair and even-handed treatment of the political parties that compete for votes. The questions we must resolve therefore go beyond those we have already addressed in the *Saskatchewan Reference*. Nevertheless they remain closely related. As mentioned above, the *Saskatchewan Reference* provides a template for constitutional analysis that can be applied to the issues raised by this appeal.

114 The *Saskatchewan Reference* stands for the proposition that adverse effects on the capacity of an individual citizen to participate are not equivalent, in and of themselves, to a denial of meaningful participation or effective representation. In order to determine whether such measures conflict with s. 3, their nature must be identified and their impact must be weighed in the full context of the political system.

115 Dilution of some citizens' voting power as compared to that of others clearly has an adverse effect on the capacity of the disadvantaged citizens to participate in the political process. It does not prevent them from participating altogether, but it does impose a handicap on them. It is true, as my colleague points out, that the boundary drawing discussed in the *Saskatchewan Reference* enhanced the effective representation and the participatory rights of some citizens, those who belonged to remote, geographically defined or minority communities. But this arrangement also discounted the weight of urban citizens' votes in comparison to those of rural and northern citizens, and in that sense it interfered with the capacity of urban voters to participate.

116 It may be more precise to say that the electoral boundaries in the *Saskatchewan Reference* diminished one aspect of effective representation — the representation of the urban voter as a single individual who should count equally with every other individual voter. On the other hand, because they enhanced another aspect of the effective representation of the northern voter, they resulted in more effective representation of that person as a member of a northern community. Without such measures, the northern voter's community identity would be under represented as compared to the city dweller's community identity, because force of numbers might drown out the interests of the numerically smaller community. Yet the two individuals would be more fairly represented, viewed as isolated individuals rather than as members of their respective communities, if their votes "counted" equally.

117 This Court recognized in the *Saskatchewan Reference* that some diminution of one aspect of effective representation (parity) can ultimately result in the provision of more effective representation. This acknowledgement suggests that effective representation is not reducible to any single value, but consists of many different components. Citizens may make political choices that represent their interests as individuals, or they may attach more importance to being represented as members of communities of interest both narrow and broad. The constitutional obligation to ensure that this complex matrix of interests is represented effectively allows for a fairly wide range of alternatives, each combining or prioritizing the various elements at play in a different way. For example, if a province were to design its electoral districts to be as close to numerical equality as practically possible, this arrangement might (depending on the particular facts and context) be just as acceptable in terms of s. 3 as an electoral map designed to enhance the voting power of minority communities.

118 The concept of meaningful participation, like effective representation, comprises a number of different aspects. It can be just as meaningful — sometimes, perhaps, more so — to participate as a member of a community or a group (such as a political party) as it is to participate as an individual, and

enhancing opportunities for the first kind of participation almost unavoidably entails some cost in terms of purely individualistic participatory values. The design of the electoral system involves striking an appropriate balance between the many different virtues that democratic systems can possess. Such choices are based on political value judgments which are the prerogative of the legislature, to the extent that they do not result in a denial of the opportunity for meaningful participation.

119 In order to identify such a denial, we must look at more than just the fact that there has been an adverse impact on a particular individual's capacity to participate. We must assess the severity of the impact, and make sure there is a good reason for it — a good reason being one related to pragmatic exigencies, to the enhancement of other aspects of political participation, or to the overall provision of more effective representation. The question is not whether there is any dilution at all of the individual citizen's capacity to participate, but whether there is undue dilution. Undue dilution occurs when the impugned measure, considered in context and taking into account its effect on all aspects of participation, so constricts an individual citizen's opportunity to make free choices or to compete fairly in the political process that he or she no longer has a meaningful opportunity to participate.

D. *Competing Values and Proportional Analysis Within Section 3*

120 I am in complete agreement with Iacobucci J. that the impugned provisions of the *Canada Elections Act* interfere with the capacity of certain citizens to participate in the electoral process. The provisions at issue in this appeal confer benefits on parties that meet specified criteria, among them the requirement that they nominate candidates in at least 50 ridings. While the primary intention may be to enhance the effectiveness of registered parties to convey their message to the electorate and to represent their supporters' views, I agree with my colleague's reasoning that an inevitable consequence is to diminish the capacity of parties that fail to meet the threshold to do the same things. As Iacobucci J. explains, the reason for this is the competitive nature of elections. A measure designed to give certain players an advantage in the game necessarily imposes a disadvantage on the others; these two propositions are two sides of the same coin.

121 But the infringement analysis should not stop here. In my view, the unequal competitive position of parties under the 50-candidate rule is analogous to the unequal voting power of voters in numerically uneven districts. Having established the existence of an adverse impact on certain participants, we must go on to examine its severity and the reason for it. All the relevant contextual factors must be taken into account in the determination of whether meaningful participation has been denied.

122 A full and nuanced inquiry into the meaning of s. 3 and the scope of the protection it provides must, in my opinion, proceed along these lines. With due consideration given to the various

competing values within s. 3, the impugned measure should be carefully examined to ascertain whether the balance struck by the state in the particular case is consistent with s. 3 and with the concepts of meaningful participation and effective representation.

123 Such an inquiry naturally takes the form of a proportionality analysis; it involves identifying how the measure diminishes one or more aspects of participation in the democratic process, and weighing that detrimental effect against its benefits as a means of enhancing other aspects of participation. Because the form of this analysis resembles the framework used in connection with s. 1, it becomes necessary to respond to the assertion (at para. 31 of the majority opinion) that it is inappropriate to balance collective interests against individual rights in identifying an infringement of s. 3.

124 I agree that any balancing of collective interests against the rights protected by s. 3 should be confined to s. 1, but some form of balancing of competing values, or of proportional assessment, remains appropriate, at this stage of the inquiry into the nature of the protected rights, in defining what those rights are. This step in the analysis is prior to concluding that the individual rights enshrined in s. 3 have been violated. It is only after that question has been answered that the question of balancing collective interests against s. 3 rights arises.

125 The reasons of my colleague reject the proposition that values other than the purely individual are relevant in determining the scope of s. 3. It must be acknowledged that this position appears, at first, to be supported by previous pronouncements of this Court, but a closer analysis of the jurisprudence of our Court will lead to a different conclusion. In *Sauvé*, *supra*, the Chief Justice rejected the government's argument that legislation depriving federal prisoners of the right to vote could be consistent with s. 3, concluding, at para. 11, that "s. 3 must be construed as it reads, and its ambit should not be limited by countervailing collective concerns". In *Harvey*, *supra*, the government argued that a law disqualifying persons who had been convicted of offences involving corrupt practices from voting or being a member of the provincial legislature was consistent with limitations inherent to s. 3 itself, because the legislation helped to ensure the integrity of the political process and thus contributed to effective representation. Although La Forest J., writing for a majority of the Court, described these arguments as initially appearing persuasive, he rejected the government's position, both because it contradicted the clear language of s. 3 and because to accept it "would be to remove the balancing of interests from s. 1 and incorporate it in s. 3 of the *Charter*" (*Harvey*, at para. 29).

126 But *Sauvé* and *Harvey* can be distinguished from this case because they dealt with outright exclusion of certain citizens from voting or being candidates for election. Indeed, in *Harvey*, at para. 25, La Forest J. referred to the "contrast" between this Court's approach in the *Saskatchewan Reference* and its approach to "particular statutory disqualifications of voters". *Sauvé* and *Harvey* were cases in the latter group. This case is not. Government actions that affect the conditions under which citizens vote or run for election engage s. 3 without directly clashing with its plain language, as literal prohibitions

do, and they call for a different kind of analysis. Ascertaining whether the right has been infringed requires us to acknowledge the need for an appropriate compromise between the competing forces that together define meaningful participation.

127 It is not unusual for such balancing to take place in defining the ambit of a *Charter* right. This kind of analysis has become familiar in connection with certain *Charter* rights — particularly those described by Professor Hogg as "qualified rights", rights that "are by their own terms qualified by notions of reasonableness or regularity" (P. W. Hogg, *Constitutional Law of Canada* (student ed. 2002), at p. 804).

128 Section 7 of the *Charter*, for example, provides that the interests it protects can be limited by state action that conforms to principles of fundamental justice. The phrase "the principles of fundamental justice" invokes competing principles that exist, in the words of Iacobucci J., in "dynamic tension" with each other (*R. v. S. (R.J.)*, [1995] 1 S.C.R. 451, at para. 108). If a law is found to conflict with one of the principles of fundamental justice, the next step in the analysis is to identify any other, opposed principles that are enhanced by the law, and to consider the interplay between the various principles holistically in order to reach a final conclusion on whether the law is or is not consistent with s. 7.

129 Similarly, s. 8 protects the right to be free from "unreasonable" search and seizure. In working out what is "reasonable" in this context, courts customarily balance the individual's interest in being let alone against the government's interest in investigation and law enforcement (see *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 159-60). McLachlin J. and Iacobucci J., in *R. v. Mills*, [1999] 3 S.C.R. 668, at para. 86, noted that "the appropriateness of the balance is assessed according to the nature of the interests at stake in a particular context, and the place of these interests within our legal and political traditions".

130 The content and scope of every *Charter* right, even when the text of the right in question does not include limiting words such as "reasonable", is determined with reference to its purpose. A right's purpose may be connected not only to purely individual interests but also to communitarian or group concerns. For example, the right to freedom of association protected by s. 2(*d*) of the *Charter* is defined "primarily as an instrument of self-fulfilment and realization of the individual" (*R. v. Advance Cutting & Coring Ltd.*, [2001] 3 S.C.R. 209, 2001 SCC 70, at para. 170), but this Court has also recognized its social and collective dimension by identifying its purpose as being "to protect the collective pursuit of common goals" (*Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211, at p. 252). And the right to equality protected by s. 15 of the *Charter* is expressly an individual right, but the concept of freedom from discrimination is related (as the grounds of discrimination listed in s. 15(1) demonstrate) to the individual's membership in certain social groups and to the relationships between minority groups and Canadian society.

131 The jurisprudence I have referred to provides insights which are highly relevant to s. 3. Section 3 is not a "qualified" right as far as literal prohibitions on voting or running for office are concerned. But when we are dealing with the additional protections that must implicitly be included if the literal language of the section is to be given full effect, the situation changes. We identify this implicit content with qualified phrases: "effective representation" and "meaningful participation". Section 3 ensures that voters are "reasonably informed of all the possible choices" and that parties and candidates have "a reasonable opportunity to present their positions" (*Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, at para. 47 (emphasis added)). At its heart is "the right to play a meaningful role in the selection of elected representatives" (*Haig v. Canada*, [1993] 2 S.C.R. 995, at p. 1031 (emphasis added)). The fact that our Court routinely uses such modifying language in describing the scope of s. 3 indicates that the analysis appropriate for the expressly "qualified" rights also applies here, except when literal disqualifications are at issue.

132 To determine whether s. 3 has been infringed in a given case, we must be attentive to the fact that representation has different aspects and that some of its aspects are not easily reconciled. Iacobucci J.'s phrase "dynamic tension" is as apt in this context as it is in connection with s. 7. And in s. 3, as in s. 8 of the *Charter*, the analysis is undertaken with awareness of our legal and political traditions.

133 Furthermore, s. 3, like s. 2(*d*) and s. 15, while it is ultimately a right of each individual citizen, cannot be understood without reference to its social and systemic context. The rights to vote and to be a candidate do not fit the classic model of a negative individual right to be free from government interference. Citizens cannot exercise s. 3 rights on their own, without the state's involvement. Rather, s. 3 imposes a positive obligation on the government to set up an electoral system which, in turn, provides for democratic government in accordance with the choices of Canadian voters. Measuring the system against the constitutional ideals of effective representation and meaningful participation requires assessing how well it represents both Canadian society as a whole, and the groups that make up our social fabric. Evaluating the fairness of the system involves looking at how each citizen fares in relation to others. Section 3 rights are individual rights, but their meaning is determined by their social and relational context.

134 Having determined that a legislative measure constrains the capacity of certain individuals to participate in the democratic process, we must then go on to examine whether as a result the electoral system fails to meet the constitutional standard of providing effective representation and meaningful participation, bearing in mind the countervailing values, including social and collective values, that are comprised within those phrases. I suggest that this inquiry must take the form of a proportionality analysis. I would not equate such an analysis with the balancing of collective interests and individual rights which should take place under s. 1. Rather, I would reiterate my view that the individual right to meaningful participation has many aspects, or comprises many competing principles. When a government measure exacts a cost in terms of one of those principles, its consistency with s. 3 depends on whether there are corresponding benefits related to other democratic values and whether, when costs and benefits are considered together, the end result is or is not a deprivation of meaningful participation.

135 For the reasons stated by Iacobucci J., I agree that the provisions at issue in this appeal do interfere with the capacity of some individual citizens to participate. The next step is to ask whether the legislation enhances any of the competing values which contribute to meaningful participation and effective representation.

E. *The Democratic Values Furthered by the Legislation*

136 Reserving certain privileges for parties that nominate 50 or more candidates in an election, generally speaking, gives an advantage in electoral competition to larger parties with a broader geographical base. While the adverse consequences to smaller parties and parties whose support is concentrated in relatively few ridings, and the costs in terms of fairness to their candidates and supporters must be acknowledged, nevertheless, the favourable treatment of more broadly based parties does further an aspect of effective representation that can validly be weighed in the balance against the value of individual participation.

137 The 50-candidate rule tends to channel voter support towards parties that engage in internal compromise and consensus building so as to emerge as mainstream, broadly based political movements. I would identify the value enhanced by this measure as the aggregation of political preferences, or the promotion of cohesion over fragmentation. The Alberta Court of Appeal alluded to this aspect of democratic representations in the *Alberta Reference*, *supra*, at p. 216, when it spoke of "shared representation" as encouraging "the mutual understanding and respect that is essential to a healthy democratic life". This value is closely connected, in the context of this appeal, to the role of political parties in the Canadian electoral system.

F. *The Value of the Party System*

138 Political parties are key institutions in the Canadian system of representative and responsible government — that is, government where laws are made by elected representatives of the people and where the executive is responsible to the legislature and enjoys the confidence of a majority of its members.

139 The Royal Commission on Electoral Reform and Party Financing (the "Lortie Commission") observed in its 1991 Report (*Reforming Electoral Democracy: Final Report*, vol. 1) that political parties have played a prominent role in Canadian politics since the struggle to attain responsible

government in Canada in the first half of the nineteenth century, becoming deeply rooted in Canadian society — in contrast to their British counterparts, which at that time were primarily parliamentary factions. By Confederation, parties had become "an essential component of the effective operation of responsible government and the central focus for the mobilization and participation of citizens in political life" (Report of the Lortie Commission, vol. 1, at p. 211).

140 As my colleague notes at para. 39 of his reasons, parties enhance representation by making the political participation of individuals more effective than it would be if those individuals acted alone, without the coordination, structure and cooperation that the party system provides. Parties keep voters informed of important issues and provide them with meaningful electoral choices.

141 Canada's form of responsible government also reflects the central role of political parties. The Constitution gives the Governor General the formal power of selecting the Prime Minister and Cabinet, but by convention she invariably appoints the leader of the party that has won the majority of seats in Parliament (assuming that there is one) as Prime Minister, and follows his recommendations in appointing the other ministers (see Hogg, *supra*, at p. 255; H. Brun and G. Tremblay, *Droit constitutionnel* (4th ed. 2002), at pp. 374-79). The Lortie Commission commented on the party system as a foundation of responsible government, noting that the fundamental constitutional characteristics of our system "assume a structure of political representation in Parliament that makes it possible to form a government and hold it responsible to elected members", and that parties, by structuring electoral choice, help to enable voters to determine who forms the government (Report of the Lortie Commission, vol. 1, at p. 209).

142 The Lortie Commission devoted an entire chapter of its 1991 Report to a discussion of the function of political parties. The title of that chapter, "Political Parties as Primary Political Organizations", sums up the Commission's view of the crucial role played by political parties in our democratic system. The Commission described parties as "best suited to performing a host of activities essential to representative democracy" (Report of the Lortie Commission, vol. 1, at p. 207). It identified three key functions of political parties: structuring electoral choice so as to make the vote meaningful; providing mechanisms for political participation, thus enhancing democratic self-government; and organizing elected representation in Parliament, thus contributing to the effective operation of responsible government (vol. 1, at p. 209).

143 Parties are such important actors in our political system that, although they are private and voluntary organizations, they also possess some of the characteristics of a public institution. It is therefore to be expected that the identification and regulation of parties should have become one of the functions of Canadian elections law; indeed, it is rather surprising that the existence of political parties was not recognized at all in federal election legislation until 1970. The formal recognition of parties in the *Canada Elections Act* came about in response to the recommendations of the Committee on Election Expenses (the "Barbeau Committee") in its Report issued in 1966 (*Report of the Committee on Election Expenses*).

144 As the Barbeau Committee noted, before the amendments to the *Canada Elections Act*, only the fundraising and spending of individual candidates were regulated, although parties played a very significant role in organizing political financing. This meant that election financing remained in effect virtually unregulated. The Committee saw the lack of effective public control over political financing as posing a serious threat to the proper functioning of the democratic system. It created opportunities for corruption and made it less likely that parties and legislators would act in conformity with the public interest.

145 Part of the Barbeau Committee's proposed solution to these problems was the creation of a formal registry of political parties. Registered parties would be held accountable for their actions, and in particular for disclosing the sources of their funding and how it was spent. To minimize the distorting effect of large private contributions, the Committee recommended public subsidies for basic campaign expenses. It also proposed the use of tax incentives for individual contributions to political parties so as to increase public participation by broadening the base of political contributions. The Committee recommended that candidates' affiliations to registered political parties appear on the ballot, thus providing voters with more complete information about the candidates. These benefits were to be made available only to parties that complied fully with registration requirements (see *Report of the Committee on Election Expenses*, at pp. 37-48). Many of the Barbeau Committee's recommendations were adopted in major amendments to the *Canada Elections Act* in 1970 and 1974.

146 Fielding at least 50 candidates in an election, as one of the requirements for party registration, is part of the framework for the recognition and regulation of political parties that was set up in response to the Barbeau Committee's proposals. The overall scheme of which it is a part has improved our electoral system and furthers the important democratic values of accountability, political communication, and grassroots participation. While the impugned provision cannot, of course, borrow its constitutional validity from the surrounding provisions of the *Canada Elections Act*, it should not be divorced from its context for the purposes of constitutional scrutiny.

G. *Competing in a Relatively High Number of Ridings as a Criterion for Registration*

147 Legal recognition of parties necessitates legal definition of what a party is. The criteria for registration in the *Canada Elections Act* are designed to ensure both that parties live up to their obligation to account for their income and expenditures, and also, perhaps more controversially, that the benefits of registered party status are reserved for those organizations that genuinely fulfil the functions of political parties in our electoral system. It is in this light that the requirement of nominating 50 candidates must be viewed.

148 Two main functions of political parties can be identified: affecting the development of policy by publicizing ideas and influencing the political agenda; and competing in elections to gain a position in the legislature. These functions are often intertwined, but it is really the second that marks out a political party as a party in distinction to other participants in political debate. As the Lortie Commission noted, the first function is shared by interest groups – organizations which communicate ideas to the public, and seek to shape the political agenda and influence government policy, often focussing on a single issue or cluster of issues, but do not compete for elected office (Report of the Lortie Commission, vol. 1, at pp. 222-23). The registration system and the public policy objectives it promotes are related to the role of parties as competitors in elections. Indeed, many of the benefits of registration are virtually meaningless outside the context of electoral competition – although some, such as tax credits to contributors, could be attractive to groups that do not seriously intend to compete in elections. Making them available to such groups as well as genuine parties could undermine the purposes of the registration scheme.

149 For these reasons, in my opinion, a requirement of nominating at least one candidate, and perhaps more, in order to qualify for registration as a party would not raise any serious constitutional concerns. Official recognition of parties could hardly work without such a requirement. Nominating candidates and competing in the electoral process is fundamental to the nature of parties as opposed to other kinds of political associations, such as interest groups.

150 But although the objectives referred to by the Barbeau Committee provide the beginning of an explanation of the 50-candidate rule, they are not enough to explain fully why parties should be required to nominate candidates in a fairly large number of constituencies. Undoubtedly, this rule shuts out some parties which are genuine competitors in the electoral process (and not mere interest groups), but which for valid strategic reasons decide to concentrate their campaign resources in a small number of ridings. In other words, it would be possible to achieve the enhancement of democratic values that the Barbeau Committee saw in a system of party registration, without making the nomination of so large a number as 50 candidates a prerequisite for recognition as a party. The question, then, is whether this particular feature of the regime can be said to enhance effective representation in some way. To answer this question, I return to the value referred to earlier, that of aggregating political preferences.

151 Requiring that registered parties be committed to electoral competition in a fairly high number of ridings tends to tilt the system in favour of larger parties and parties whose support is geographically dispersed. The Lortie Commission saw the 50-candidate rule as an appropriate way of identifying parties that were equipped for electoral competition on a national scale (vol. 1, at p. 249):

> A political party that nominates candidates in 50 constituencies would demonstrate serious intent to engage in the rigours of electoral competition at a level that indicates relatively broad appeal for its program and ideas. Moreover, experience since 1974 shows that this level is neither unduly onerous nor too lenient for registration. We believe that this threshold should continue to serve as a benchmark in determining which parties may be

registered under the *Canada Elections Act*.

Nomination of 50 candidates demonstrates two things about a party (as the Lortie Commission observed): a high level of commitment to electoral competition, and breadth of appeal. The rule therefore favours established parties with a broad basis of support. A system which benefits such parties has its drawbacks, in that it limits citizens' opportunities to support smaller parties whose platforms may correspond closely to their own particular political agendas. On the other hand, it furthers a value which plays a part in defining effective representation in Canada, the aggregation of political will and the promotion of cohesiveness over factionalism.

H. *Aggregation of Political Preferences as a Value Manifested in our History and Political Institutions*

152 As the present Chief Justice observed in the *Saskatchewan Reference*, *supra*, at p. 185, "[t]he circumstances leading to the adoption of the *Charter* negate any intention to reject existing democratic institutions". I agree with McLachlin J.'s (as she then was) assertion in that case that inequities in the electoral system are not acceptable merely because they have historical precedent, and that institutions are not constitutional merely because they already exist. I also agree with her that we should look to past and present institutions as the soil in which the "living tree" that is the Canadian Constitution is rooted, while recognizing that the tree "must be capable of growth to meet the future" (*Saskatchewan Reference*, *supra*, at p. 180).

153 My conclusion that aggregation and cohesiveness form part of the many values that contribute to the meaning of democratic rights in Canada is supported by aspects of our history and existing institutions. Our political system is, and traditionally has been, characterized by other important features that correspond to this pattern of favouring political aggregation. On the spectrum of democratic political systems, from those that represent citizens in a more diverse and fragmented way to those where only a small number of mainstream parties has any significant presence in the political arena, the Canadian system is towards the latter end of the range. This has not come about by accident, but in part as a result of the deliberate design of our electoral infrastructure to confer advantages on mainstream political movements that are denied to parties on the political periphery.

154 Perhaps the most significant example is the structure of our system of voting. Canada is one of only a few major democracies to retain the Westminster first-past-the-post ("FPTP") system. Many other democratic states use proportional representation or some form of mixed system. In comparison with those systems, FPTP creates a bias in favour of mainstream parties that represent the

aggregated views of a broad section of society, and against smaller parties which provide a vehicle for dissent, advocate particular issues, or may be the precursors of mainstream political movements of the future. It does not make it impossible for the latter to participate, but it makes it more difficult for them to compete. Of the electoral systems used in democratic countries, FPTP is the least "fair" or proportional, in that it distorts the translation of votes into seats in favour of the largest parties (H. MacIvor, "A Brief Introduction to Electoral Reform", in Milner, *Making Every Vote Count: Reassessing Canada's Electoral System* (1999), 19, at p. 21).

155 On the other hand, FPTP possesses other virtues that proportional or mixed systems exhibit to a lesser degree. Certain advantages flow from the fact that FPTP tends to exaggerate electoral majorities and so to produce majority governments. I recognize that, as my colleague notes, FPTP can produce coalition governments and has done so in this country on a number of occasions; nevertheless, it is more likely than other electoral systems to produce a majority government, while proportional representation almost invariably produces coalitions (MacIvor, *supra*, at pp. 28-29). Majority government is connected to the Canadian tradition of responsible government because a single party under a single identifiable leader is accountable for government policy (MacIvor, *supra*, at p. 29). Again, I would not suggest that responsible government is impossible when a minority or coalition government is elected, only that in our particular system majority governments may reasonably be seen as offering some advantage in this respect. Some observers also associate FPTP and majority governments with greater stability as compared to the most purely proportional systems.

156 Under FPTP, the most successful parties are those that represent a broad alliance of different communities of interest. Our electoral system thus encourages coalition building within rather than between parties (by contrast, under proportional representation, coalitions are typically formed between parties in order to form a government after an election). One political scientist has argued that FPTP in combination with the special characteristics of the Canadian political landscape has fostered the development of "centrist, accommodative parties" that are particularly well-suited to representing a regionally, linguistically and culturally diverse country:

> The fight has been for the middle, drawing the principal parties there with policies and leadership that were aimed, if the party was serious about gaining or retaining office, more at accommodating regional rivalries and linguistic differences than exacerbating them or trying to turn them to electoral advantage.
>
> (J. C. Courtney, "Electoral Reform and Canada's Parties", in Milner, *supra*, 91, at p. 99)

157 The desirability of centrist, accommodative parties and the virtues of majority government are not truths universally acknowledged; the views I have referred to are value judgments on which there

is vigorous debate. Many academics and political activists are critical of our electoral system and call for its reform. My point is simply that one can reasonably view FPTP as possessing the main virtue claimed for it, the virtue of fostering a strong political centre and reducing factionalism. And because our FPTP electoral system is one of Canada's core political institutions, it is reasonable to conclude that this virtue remains consistent with certain values of our democratic culture – even if, bearing in mind that the Canadian concept of democracy embodies many competing values, it clashes with others. Certain aspects of the design of our political system appear to reflect a preference for the kind of party that has gained, in the words of the Lortie Commission, at p. 249, "relatively broad appeal for its program and ideas".

158 It should be emphasized that I do not intend to express any opinion about the consistency of our FPTP electoral system with s. 3 of the *Charter*. Any challenge to that system will have to be evaluated on its own merits. Nor would I wish to give the impression that I consider stability, majority governments or aggregation to be more important than fair participation. Nevertheless, within the boundaries set by the Constitution, it is the legislature's prerogative to choose whether to enhance these values over other democratic values, or not. Still less should I be taken as suggesting that FPTP or any feature of the electoral system that favours larger parties is constitutionally mandated. On the contrary, I would argue that the government has a fairly wide latitude in choosing how to design the electoral system and how to combine the various competing values at play.

159 The value of political aggregation runs through certain fundamental Canadian political institutions. As a result, it should be taken into account (although it should not, of course, be the only value taken into account) in determining the meaning of "effective representation" and the limits that s. 3 sets on the choices open to the government.

160 History and existing institutions help us to identify the philosophy underlying the development of the right to vote in this country (*Saskatchewan Reference*, *supra*, at p. 181). That philosophy appears to me to be one that comprises recognition of other values than individual participation – including the value of aggregation of political will, which has been a hallmark of the Canadian political system for so long.

161 The right of each individual to meaningful participation sets the limit on what is permissible, but up to that limit, many options might reflect quite different, but equally acceptable, versions of democratic representation. Within constitutional limits, the choice among these options should be viewed as a matter of political and philosophical preference in which it is not this Court's role to intervene. The Constitution of Canada does not require a particular kind of democratic electoral system, whether it is one that emphasizes proportionality and the individual aspects of participation or one that places more emphasis on centrism and aggregation, to be frozen in place. It does require courts to be vigilant in ensuring that the system does not unduly compromise any of the values comprised within the concept of effective representation — especially the primary value of individual participation in fair elections on a basis of relative equality.

I. *Regional Representation*

162 So far I have discussed two aspects of representation that are implicated by the provisions challenged in this appeal: individual participation, which the legislation undermines, and aggregation, which it tends to enhance. In my view, a third factor is also at play: regional representation.

163 On the basis of Canadian history, existing political institutions and certain statements of this Court, I would conclude that one component of effective representation is the interest of citizens in being represented as members of regionally or territorially defined communities. This argument may appear hard to reconcile with my position that aggregation of interests and alliance building between distinct communities is also a value that plays a part in defining Canadian democracy. I view this difficulty as an example of the complex and even somewhat paradoxical nature of the concept of meaningful participation, which represents a compromise between competing objectives. Regionally or geographically defined representation can also conflict with the value of individual participation on an equal footing, as is the case when some votes are given more weight than others so as to ensure that numerically smaller regions have an audible voice.

164 Perhaps the most significant manifestation of the importance of political representation of regional interests in Canada is our federalist system. Federalism was adopted at Confederation in spite of the push by some politicians for "legislative union" — a single central government elected by a nationwide majority. The proponents of legislative union eventually accepted that neither Lower Canada nor the Maritime provinces would accept such an arrangement, in which the power of greater population might overwhelm and eradicate their distinct communities. During the Confederation Debates in Parliament, Sir John A. Macdonald stated that "any proposition which involved the absorption of the individuality of Lower Canada . . . would not be received with favor by her people" and in the Maritime provinces, although they shared a language and a system of law with Upper Canada, "there was as great a disinclination . . . to lose their individuality, as separate political organizations" (Speech of John A. Macdonald on Monday, February 6, 1865, cited in the *Parliamentary Debates on the subject of the Confederation* (1865), at p. 29).

165 Macdonald and the other Fathers of Confederation recognized that the very possibility of union depended on a compromise between rule by a national majority and preserving the "individuality" of the separate political communities that made up the new nation. Federalism was seen not just as a pragmatic solution but as necessary to ensure fairness to the various regional communities. In the *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 ("*Secession Reference*"), at para. 43, this Court described the division of powers between federal and provincial levels of government as "a legal

recognition of the diversity that existed among the initial members of Confederation", which "manifested a concern to accommodate that diversity within a single nation".

166 Another institution which embodies this principle of regional representation is the Senate, where seats are allocated between four regions of the country. And even in the House of Commons, regional interests play a part in the allocation of seats. The "Senator[ial] clause" (s. 51A), added in 1915 to the representation formula in the *Constitution Act, 1867*, ensures that no province will have fewer seats in the House of Commons than it has in the Senate (at the time this change had the effect of guaranteeing that Prince Edward Island would have four seats although its population would have given it only three under the old rules).

167 These features of Canada's history and political institutions indicate that fair democratic representation in this country includes representation of the distinctive interests of regional groups. I find support for this conclusion in some of this Court's statements on the relationship between federalism and democracy, particularly in the *Secession Reference*, *supra*. The Court portrayed the underlying principles of the Constitution, including federalism and democracy, as existing in symbiosis: "[n]o single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other" (para. 49). This suggests that federalism, with its concern for preserving the distinctive interests of regional groups, helps to define Canadian democracy.

168 In the *Charter* era, it has been suggested that the importance of regionalism and federalism has been attenuated by the affirmation of the sovereign worth of the individual and by the protection of minority communities defined by shared characteristics such as gender and race (see A. C. Cairns, "The Charter and the Constitution Act, 1982", in R. S. Blair and J. T. McLeod, eds., *The Canadian Political Tradition: Basic Readings* (2nd ed. 1993), 62). Nevertheless, federalism and regional representation remain important concepts in defining the nature of political rights in this country. The nature of the individual and democratic rights enshrined in the *Charter* cannot be understood without awareness of this aspect of the political culture in which those rights are rooted. As J.-F. Gaudreault-DesBiens observes ("La *Charte canadienne des droits et libertés* et le fédéralisme: quelques remarques sur les vingt premières années d'une relation ambiguë", [2003] *R. du B.* 271, at p. 297), [TRANSLATION] "Federalism plays a direct role in shaping the particular brand of democracy that exists in Canada. Its presence is in some sense encoded in the very idea of democracy referred to in s. 1 [and, I would add, by the democratic rights in s. 3] of the *Charter*."

169 These observations suggest that one of the components of the right to meaningful participation is the right to have one's voice heard as a member of the regional community to which one belongs. The constitutional guarantee of effective representation includes a right to a certain degree of recognition of the individual voter's interests as a Manitoban, or a Maritimer, or a Quebecker, and it suggests a floor of relative equality between the different provinces and regions of the country which cannot be completely cancelled out by a nationwide numerical majority. This aspect of effective

representation is far from being an absolute right, and its weight should not be overstated at the risk of trumping core concerns such as fairness as between individual voters. But it is one of the values to be taken into account in defining meaningful representation and determining whether government action offends s. 3.

J. *Assessing the 50-Candidate Rule*

170 I now turn to the application of these principles to the legislation which is the subject of this constitutional challenge. Taking all the relevant factors into account, I would conclude that the requirement of nominating 50 or more candidates to gain access to the benefits at issue in this appeal compromises the competitive position of some candidates, and their supporters' freedom of choice, to such an extent that it denies those individuals the opportunity for meaningful participation.

171 Iacobucci J. has cogently demonstrated that this measure undermines the capacity of some individuals to participate in the political process. The penalties for failing to meet the 50-candidate threshold are quite severe, and they impose a considerable disadvantage on parties that lose their registered status. The respondent argues that it is relatively easy for parties to meet the threshold. Following legislative amendments in 2000, the deposit of $1,000 required for each candidate is now fully refundable on compliance with reporting requirements, so that a party would have to do no more than borrow $50,000 and collect the requisite number of signatures in order to nominate 50 candidates. In purely monetary terms, perhaps the obstacles are not difficult to surmount. But the 50-candidate requirement is a distraction and a burden for parties committed to running serious campaigns in a few ridings, because they have to field a slate of other candidates in constituencies where they have no intention of running a real campaign simply in order to secure a place on the registry.

172 On the other hand, by benefiting mainstream parties with a broad base of support, the legislation contributes to the important democratic value of aggregating political preferences. It also plays some part furthering the laudable objectives of the Barbeau Committee, by helping to identify authentic parties with a commitment to electoral competition and a substantial political agenda.

173 The 50-candidate rule is not, however, a perfect tool for these purposes. Generally speaking there is some relationship between a party's decision to run a candidate in a riding and its level of support there, but nominating a candidate is not necessarily an indication that a party has any support in the constituency. The rule is potentially subject to manipulation, and it can be both overinclusive and underinclusive. It has permitted the registration of parties that, at least for a number of citizens of Canada, would be viewed as far removed from the mainstream of Canadian politics or as single-issue movements. It is also capable of shutting out parties that do have a fully developed political platform and a genuine interest in electoral competition. The Communist Party of Canada, struck from the registry in 1993 (and reinstated in 2000), is an example: it has a long record of participation and even of

some success in elections, and its platform, while certainly not in the Canadian mainstream, is based on what has been one of the world's major political philosophies.

174 Finally, the 50-candidate rule conflicts with the principle of regional representation because of its disparate impact on different provinces and regions of the country. As the appellant points out in his factum, the rule "encourages the formation of a Bloc Quebecois or Western Canada Concept, but effectively prevents a 'Bloc BC' or 'Atlantic Canada Concept'".

175 When the registration system was adopted, the government originally proposed a higher number of 75 candidates, on the grounds that registration was meant only for "national" parties (*House of Commons Debates*, vol. VIII, 2nd Sess., 28th Parl., June 23, 1970, at p. 8509, *per* Hon. Donald Macdonald). According to the Crown's expert Professor Aucoin, the government recognized that a party could meet this requirement by fielding candidates only in Ontario, but "was willing to accept this risk". A legislative committee proposed an amendment adopting a lower threshold of 10 per cent of constituencies, but ultimately an amendment was passed adopting the threshold of 50 candidates, which was a compromise between the two positions. As Professor Aucoin observes in his affidavit, the government's "willingness to compromise on 50 meant that it was willing to accept that a party could also be formed with candidates nominated only in Quebec".

176 Whatever the pragmatic considerations in favour of that compromise, it has created unfairness for the provinces other than Ontario and Quebec. A rule encouraging parties that represent a national perspective might, depending on its other effects, be an acceptable stricture. But a rule that makes a gesture towards reserving the privileges of registration for national parties, while in fact allowing registration of single-province parties only from the two most populous provinces, is at variance with the principle that a basic level of equality between the provinces and regions of the country is protected by the Constitution. Considering the matter from the perspective of (for example) a voter from one of the Maritime provinces, this measure might be perceived as a government-created advantage to central Canada, compounding the existing advantage of greater population, and so detrimental to that voter's political importance in comparison to a voter from Quebec or Ontario as in effect to deny his or her right to meaningful participation and effective representation.

177 For these reasons, I concur with my colleague's opinion that the legislation infringes s. 3. and I agree with the remedy he proposes.

K. *Justification and the Institutional Role of the Court*

178 In my view, the justifications advanced by the government for the 50-candidate rule are relevant to the infringement stage of the analysis, and I have given them due consideration in that context. As a result, little remains to be said in defence of the legislation in connection with s. 1. I would not rule out the possibility that in another case a non-literal infringement of s. 3 could be justified by pressing and substantial collective concerns. In this case, however, my finding that the legislation infringes s. 3 essentially amounts to a conclusion that it is inconsistent with the values of Canadian democracy. It is hard to see how it could nevertheless be shown to be "justified in a free and democratic society".

179 Were I to proceed with a full s. 1 analysis, however, I would see no reason to doubt that the government's objectives are pressing and substantial. In my view, this is not one of the rare class of cases where the very purpose of the law is contrary to constitutional or democratic norms.

180 I question the suggestion that favouring large parties with a broad base of support over marginal parties is discordant with, even antithetical to, the principles integral to a free and democratic society. As I have observed, our electoral system tends to reward parties that appeal to the political mainstream and whose support is spread out across the nation, and to penalize parties that appeal to more particularized interests. This is a feature of Canadian democracy which is apparent in the design of core political institutions. It has contributed to a tradition of centrism and coalition building within political parties, and this has facilitated the harmonious democratic governance of a highly diverse nation with no shortage of centrifugal political pressures. The values furthered by the legislation are consistent with some of the foundational principles on which our particular free and democratic society is based.

181 Furthermore, I have difficulty with the notion that the Crown should be required to demonstrate that the electoral system Parliament has adopted results in "substantially better governance" (Iacobucci J., at para. 89) than an alternative system. My concern is not only that it is hard to imagine how one could prove empirically that one form of government is better than another. More importantly, the definition of "good" or "better" government is not something that should be fixed as a legal standard. It is a question on which vigorous disagreement between reasonable people may and does arise. Indeed, disagreement on this question is often one of the hallmarks of a democracy. My remarks are of course subject to the proviso that Canadians are committed, both as a matter of political tradition and constitutionally, to a democratic form of government. But within the category of democratic government, many variations may be found with quite different characteristics, and choosing one over another is a matter of choice between political values.

182 In suggesting that the motive behind the legislation may itself be illegitimate, the Court risks unduly expanding the scope of judicial review of the design of the electoral system. I would sound a note of caution against blurring the distinction between the respective roles of the Court and the legislature in dealing with a question which, while it certainly has legal dimensions, is also profoundly

political. Within certain boundaries, which it is the responsibility of the judiciary to delineate, balancing competing democratic values and choosing between the various species of democratic electoral systems primarily fall within the domain of political debate and of the legislative process. Those boundaries should be viewed as fairly broad. They allow for a good deal of latitude within which the people, through their elected lawmakers, may choose rules and institutions that enhance certain aspects of the democratic right to meaningful participation and diminish others.

183 The *Charter* mandates that whatever system is adopted must respect the right of each individual to meaningful participation. But we should be circumspect about defining that right too inflexibly, lest legitimate political debate on the issues be impeded. The possibility of dialogue between courts and legislatures on the meaning of the right to vote may be unduly constrained if this Court declares that certain values, even though they have long been part of our political tradition, must be excluded from consideration in the interpretation and application of s. 3 of the *Charter*.

Appeal allowed with costs.

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